(17) (17) (18) (21)

Nos. 05-204, 05-254, 05-276 & 05-439

Supreme Court, U.S.
FILED
FEB 1 - 2006
OFFICE OF THE CLERK

In The
Supreme Court of the United States

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, *et al.*,

Appellants,

v.

RICK PERRY, *et al.*,

Appellees.

TRAVIS COUNTY, TEXAS, *et al.*,

Appellants,

v.

RICK PERRY, *et al.*,

Appellees.

On Appeal From The United States District Court For The Eastern District Of Texas

BRIEF OF *AMICI CURIAE* SPEAKER OF THE GEORGIA HOUSE OF REPRESENTATIVES GLENN RICHARDSON; SPEAKER PRO TEMPORE OF THE GEORGIA STATE SENATE ERIC JOHNSON; HOUSE MAJORITY LEADER JERRY KEEN; SENATE MAJORITY LEADER TOMMIE WILLIAMS; AND SENATOR CHIP ROGERS AND REPRESENTATIVE BOBBY FRANKLIN, CHAIRMEN OF THE REAPPORTIONMENT COMMITTEES OF THE GEORGIA GENERAL ASSEMBLY IN SUPPORT OF APPELLEES

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EDDIE J. ACKSON, *et al.*,

Appellants,

v.

RICK PERRY, *et al.*,

Appellees.

GI FORUM OF TEXAS, *et al.*,

Appellants,

v.

RICK PERRY, *et al.*,

Appellees.

QUESTIONS PRESENTED

Does the Constitution require federal court-ordered redistricting plans to remain in effect during an entire decade, foreclosing all subsequent redistricting legislation enacted by the Legislature?

Does the Constitution restrict the redistricting authority of state legislatures to one time per decade, thereby mandating the use of the first-passed plan for the entire decade and prohibiting state legislatures from remedying gross partisan gerrymandering that exists in the plan?

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STATEMENT OF INTERESTS OF *AMICI CURIAE*

The *Amici Curiae* are the Speaker of the Georgia House of Representatives Glenn Richardson; the President Pro Tempore of the Georgia State Senate Eric Johnson; the Majority Leader in the Georgia House of Representatives, Jerry Keen; the Majority Leader in the Georgia State Senate, Tommie Williams; the Chairman of the Legislative and Congressional Reapportionment Committee of the Georgia House of Representatives, Bobby Franklin; and the Chairman of the Reapportionment and Redistricting Committee of the Georgia Senate, Chip Rogers ("the Georgia Legislative *Amici*").[1] The Georgia Legislative *Amici* led the 2005 effort in the Georgia General Assembly to redraw Georgia's 2001 Congressional Plan, which represented one of the worst and most blatant partisan gerrymanders of the decade. *See* App. 1. As a result, the 2005 Georgia General Assembly enacted a Congressional redistricting plan which eliminated the 2001 gerrymander and provided a rational Congressional plan for the remainder of the decade ("the 2005 Congressional Plan"). *See* App. 2.

The Georgia Legislative *Amici* submit this brief because they are concerned that the severe restriction on redistricting urged by Appellants, if accepted, would unconstitutionally impinge upon the right and obligations

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[1] As required by Rule 37.3(a) of this Court, *Amici Curiae* have sought and received the written consent of all parties to file this brief presented. Copies of letters of consent signed by counsel are filed herewith with the Clerk of the Court. Pursuant to this Court's Rule 37.6, *Amici Curiae* state that none of the parties authored this brief in whole or in part, and no person or entity, other than the *Amici Curiae* or their counsel, made a monetary contribution to the preparation or submission of the brief.

of state legislatures. The Georgia Legislative *Amici* seek to ensure that the Georgia General Assembly continues to be able to exercise its redistricting power both (1) after the imposition of federal court-ordered plans specifically and (2) during the decade generally.

SUMMARY OF ARGUMENT

This Court should reject Appellants' argument that state legislatures are limited to one redistricting plan per decade, whether court-ordered or legislatively-enacted. Neither the Constitution nor this Court's jurisprudence provides any support for the imposition of such restrictions on the redistricting power and authority of state legislatures.

As an initial matter, the existence of a court-ordered plan does not strip a legislature of its prerogative to enact a redistricting plan. To the contrary, in implementing plans, courts consistently provide opportunities for legislatures to act first, impose plans with great reluctance and make clear that the plans are interim, *i.e.*, in effect until legislatures replace them with another valid plan.

Legislatures are also free to change their own plans throughout the decade, as long as the new plan meets constitutional and statutory requirements. In Georgia, the redistricting process has historically gone on throughout the decade, with the General Assembly revising various districts as it deems appropriate.

Appellants' framework, however, would limit the states to one redistricting plan for the decade, whether drawn by a court or the legislature. Appellants initially

appear to restrict the limitation they urge to mid-decade redistricting when the same is done "for the sole purpose of maximizing partisan advantage," Appellants' Brief at 17. However, application of the rule urged by Appellants – coupled with their argument invoking the constitutional guarantee of one person, one vote – makes clear that the relief Appellants espouse would ultimately result in a blanket prohibition against mid-decade redistricting.

In its application, Appellants' argument would exempt from scrutiny the original redistricting plan enacted after the Decennial Census ("the Census") because such a plan would always have as one of its purposes the equalization of population; therefore, Appellants reason, the original plan could never be described as having been implemented solely for the purpose of maximizing partisan advantage. As a result, even a blatant partisan gerrymander, such as the one passed by the Georgia General Assembly in 2001, *see* App. 1, would be acceptable under Appellants' rule because, as the first plan implemented after the Census, it could not have had as its sole purpose the maximization of political power. In essence, legislatures would be given a free pass to gerrymander during the first redistricting after the Census.

Then, however, future legislatures would be forever foreclosed from remedying that gerrymander during the decade. Appellants may argue that future legislatures would only be foreclosed if the sole purpose of their later redistricting were to maximize partisan advantage. Dismantling a gross partisan gerrymander, by definition, weakens the partisan advantage of the gerrymandering party. Under Appellants' theory, the Georgia General Assembly would have been prohibited from enacting its 2005 Congressional redistricting plan, which, rather than

being a gross partisan gerrymander, *eliminated* the gross partisan gerrymander enacted in 2001, *see* App. 2.

Thus, examining the application of Appellants' theory demonstrates that Appellants' aim is to eliminate mid-decade redistricting. That objective is made even clearer by the argument of Appellants and the University Professors *Amici* that the use of Census numbers in mid-decade redistricting violates the constitutional principle of one person, one vote because the Census numbers are several years old. Because redistricting practically cannot be based on any other numbers, the argument of Appellants and the University Professors *Amici* against the use of Census numbers in mid-decade redistricting is another way of arguing against mid-decade redistricting at all.

Although Appellants' political purposes in this particular instance might be served by the result they urge, there is no constitutional basis for the limitation on the authority of the state legislatures they espouse. Furthermore, in application, such a limitation will likely result in gross partisan gerrymanders, drawn the first year of a decade, that can never be reversed. For those reasons, the Court should affirm the court below.

ARGUMENT

I. THE IMPOSITION OF A COURT-ORDERED REDISTRICTING PLAN DOES NOT OPERATE AS A WAIVER BY THE STATE OF ITS AUTHORITY TO REDISTRICT UNDER ART. I, § 4 AND CONSEQUENTLY DOES NOT PREEMPT A STATE LEGISLATURE FROM ENACTING SUBSEQUENT REDISTRICTING PLANS

The existence of a court-ordered redistricting plan in this case did not, as Appellants suggest, prohibit the Texas legislature from enacting a new plan. As discussed above, the drawing of redistricting plans is the responsibility of the state legislature. U.S. CONST., Art. I, § 4; *Branch v. Smith*, 538 U.S. 254, 261 (2003); *Growe v. Emison*, 507 U.S. 25, 34 (1993); *Chapman v. Meier*, 420 U.S. 1, 27 (1975); *Reynolds v. Sims*, 377 U.S. 533, 586 (1964). The imposition of a court-drawn plan does not effectively operate as a waiver of the state's authority to redistrict.

To the contrary, court-ordered plans are inherently interim solutions, implemented only when a legislature fails to draw a plan or the plan enacted by a legislature is struck down by the court. *See, e.g.*, *Growe*, 507 U.S. at 34; *Upham v. Seamon*, 456 U.S. 37, 41-42 (1982); *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978); *Larios v. Cox*, 306 F. Supp. 2d 1212, 1213 (N.D.Ga. 2004). Before imposing a plan, a court will provide the state legislature every opportunity to enact a plan. *See, e.g.*, *Larios*, 306 F. Supp. 2d at 1214 ("the court continues to encourage the enactment of reapportionment maps by the General Assembly of Georgia, which is now in session. We are aware that members have been working on and considering such legislation. Nothing in this order or any previous order of this court is intended to prevent or forestall the General Assembly and the Governor from

considering and enacting reapportionment plans after March 1, 2004, resolving the issues in this case. Nor should this court's orders be construed in any way as to discourage such a resolution of this matter.").

More importantly, if the court must devise and impose a reapportionment plan, it does so "'pending later legislative action.'" *Larios*, 314 F. Supp. 2d 1357, 1360 (N.D.Ga. 2004), *quoting Wise*, 437 U.S. at 540 and *Connor v. Finch*, 431 U.S. 407, 415 (1977). Thus, the existence of a court-ordered interim plan does not bar later legislative action but rather presumes it.

II. THERE IS NO FEDERAL CONSTITUTIONAL OR STATUTORY LIMITATION ON THE AUTHORITY OF STATE LEGISLATURES TO REDISTRICT MORE THAN ONE TIME AFTER THE DECENNIAL CENSUS

Just as a court-ordered plan does not preempt later action by the legislature neither does the legislature's own action bar its later redistricting efforts. Absent a state constitutional or statutory provision prohibiting the legislature from enacting redistricting plans subsequent to one first implemented each decade, the legislature is free to enact new redistricting plans throughout the decade.

Federal law does not provide otherwise. In a 1964 Georgia case, *Wesberry v. Sanders*, 376 U.S. 1 (1964), this Court established that, at a minimum, a state must redistrict following the Census. That same year, in *Reynolds v. Sims*, 377 U.S. 533 (1964) this Court reiterated that a legislature's failure to redistrict once after release of the Census was "constitutionally suspect." *Reynolds*, at 583-84.

However, there is no law that supports Appellants' conclusion that the constitutionally-required minimum number of redistricting plans in a decade – one – is also the maximum allowable. As the Ninth Circuit concluded in *Garza v. County of Los Angeles*, 918 F.2d 763, 772 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991): "*Reynolds* did not institute a constitutional maximum frequency for reapportionment; rather, it set a floor below which such frequency may not constitutionally fall."

Without limitation, Art. I, § 4 of the United States Constitution vests in the state legislatures the power to draw their Congressional districts; there is no limit on the number of times a state legislature may redistrict. Likewise, although Congress has reserved to itself the power to regulate the time, place and manner of Congressional elections, 2 U.S.C. §§ 2a & 2c (2005), it has not restricted the number of times a state legislature may redistrict.

In short, a reading of the plain language of both federal constitutional and statutory provisions demonstrates that there is no limit on the number of redistricting plans that a state may implement during a decade. Likewise, a review of federal caselaw demonstrates that that redistricting plans may be amended throughout the decade. *Reynolds,* at 583-84; *Daly v. Hunt*, 93 F.3d 1212, 1228 n.15 (4th Cir. 1996); *Garza,* 918 F.2d at 772; *Johnson v. Mortham*, 926 F. Supp. 1460, 1494 (N.D.Fla. 1996) ("*Johnson II*") (three-judge panel), *aff'd sub nom., Johnson v. Smith*, 132 F.3d 1460 (11th Cir. 1997).

While some states impose restrictions upon the frequency of redistricting, the majority have not chosen to do so. In Georgia, for example, the General Assembly is not constrained by constitutional or statutory law with

respect to the number of times redistricting plans may be amended in the course of a decade, and redistricting plans have routinely been amended throughout the decade.

III. PROHIBITING REDISTRICTING MORE THAN ONCE A DECADE WILL PERMIT EGREGIOUS PARTISAN GERRYMANDERING IN THE ORIGINAL REDISTRICTING PLAN AND FORECLOSE ANY EFFORT TO REMEDY THAT PLAN FOR AN ENTIRE DECADE

Using Appellants' theory, the gross partisan gerrymander enacted by the Georgia General Assembly in 2001, *see* App. 1, would have been irrevocable. As the first plan enacted following the Census, Appellants would argue that the Georgia plan was immune from a partisan gerrymander attack because as it was enacted after the Census and ostensibly for the purpose of equalizing population, its "sole purpose" could not have been the maximization of partisan advantage.

In fact, even a cursory review of Georgia's 2001 Congressional redistricting plan demonstrates that the maximization of partisan advantage was the sole purpose of the plan; the fact that the Census had been released and the districts' populations needed to be equalized was a happy coincidence. Looking at the 2001 plan first as a whole, App. 1, and then by individual district, App. 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, there can be no doubt that the districts were grossly gerrymandered for political purposes. Absent the General Assembly's ability to redistrict again, Georgia voters would have been locked into a Congressional redistricting plan in which "districts" bore no semblance to a reasonable definition of that word.

Contrary to Appellants' fears, the Georgia General Assembly's mid-decade redistricting did not result in a partisan gerrymander. Instead, the legislature employed traditional redistricting criteria which had been used in Georgia Congressional plans prior to the 2001 plan – keeping counties whole, achieving true contiguity (rather than point contiguity) and compactness,[2] honoring the traditional cores of districts – and complied with the requirements of one person, one vote

[2] A comparison of the compactness measurements between the 2001 and 2005 districts shows a marked improvement in the 2005 plan. The change in the results of perimeter test, which measures the total distance around a district by measuring the line distance, demonstrates how contorted the districts were in the 2001 plan. By eliminating the numerous subdivision splits and meandering jagged boundaries, the 2005 General Assembly substantially reduced the attenuated 2001 geographic boundaries by a factor of more than one-third (8695-5589=3106; 3106/8693=36%). Likewise, the scores improved under the Polsby-Popper test, which deems districts closer to 1 more compact and closer to 0 less compact.

2001 District Number	2001 District Number	2001 District Number	2001 District Number	2001 District Number	2001 District Number
001	001	1106.76	0.12	763.77	0.26
002	002	697.12	0.26	692.98	0.29
008	003	1054.98	0.04	495.02	0.21
004	004	112.97	0.25	135.93	0.23
005	005	188.24	0.09	108.48	0.26
006	006	211.99	0.12	173.88	0.29
007	007	480.31	0.07	227.78	0.24
003	008	949.72	0.15	713.98	0.18
010	009	487.17	0.2	371.31	0.4
009	010	872.07	0.12	614.32	0.2
011	011	1167.02	0.03	306.4	0.36
012	012	770.7	0.11	738.29	0.2
013	013	596.3	0.03	246.75	0.12
Sum	Sum	8695.35	N/A	5588.89	N/A
Min	Min	N/A	0.03	N/A	0.12
Max	Max	N/A	0.26	N/A	0.4
Mean	Mean	N/A	0.122308	N/A	0.249231
Std. Dev.	Std. Dev.	N/A	0.076284	N/A	0.074662

and Sections 2 and 5 of the Voting Rights Act, 42 U.S.C. § 1971 et seq. In doing so, the General Assembly succeeded in creating a Congressional plan comprised of actual districts rather than pieces of geography strung together for partisan purposes. App. 2, 4, 6, 8, 10, 12, 14, 16, 18, 20, 22, 24, 26, 28.

In eliminating the contorted districts and returning cognizable districts to the voters, the Republican-controlled 2005 Georgia General Assembly did not simultaneously engage in the maximization of partisan advantage, as demonstrated by the following chart. Using the Bush vote in the 2000 election as its measurement, the chart shows a noticeable lack of an effort to grab partisan advantage:

Member	District 2001 Plan	District 2005 Plan	% Bush 2001 Plan	% Bush 2005 Plan	Change in Bush%, - 2001 to 2005 Plans
Kingston	1	1	64.5-R	62.4-R	-2.1
Bishop	2	2	51.0-R	47.6-D	-3.4
Westmoreland	8	3	70.1-R	67.0-R	-3.1
McKinney	4	4	29.3-D	29.9-D	+0.6
Lewis	5	5	28.9-D	27.2-D	-1.7
Price	6	6	69.2-R	68.2-R	-1.0
Linder	7	7	72.0-R	69.2-R	-2.8
Marshall	3	8	52.5-R	58.1-R	+5.6
Deal	10	9	71.2-R	71.0-R	-0.2
Norwood	9	10	67.8-R	62.8-R	-5.0
Gingrey	11	11	52.2-R	65.4-R	+13.2
Barrow	12	12	45.7-D	47.8-D	+2.1
Scott	13	13	42.0-D	43.3-D	+1.3

As a result of the new plan, there are only two districts in which the change in the 2000 Bush vote was greater than 5 percentage points. However, in the 2001 plan, both districts had previously been painfully contorted specifically to avoid a Republican district. *See* App. 17, 23. When the districts took on truly compact and contiguous shapes, the political performance numbers more accurately reflected the existing partisan strength. *See* App. 8, 24.

In summary, the ability to redistrict during the decade actually allowed the Georgia General Assembly to correct the gross partisan gerrymander that was the 2001 Georgia Congressional plan. Without such authority, the Georgia General Assembly would have had no ability to remediate Georgia's grossly gerrymandered 2001 Congressional districts and replace them with reasonable districts that provide fair representation to all Georgians. Mid-decade redistricting does not, as Appellants suggest, always result in partisan gerrymandering. Sometimes it cures it.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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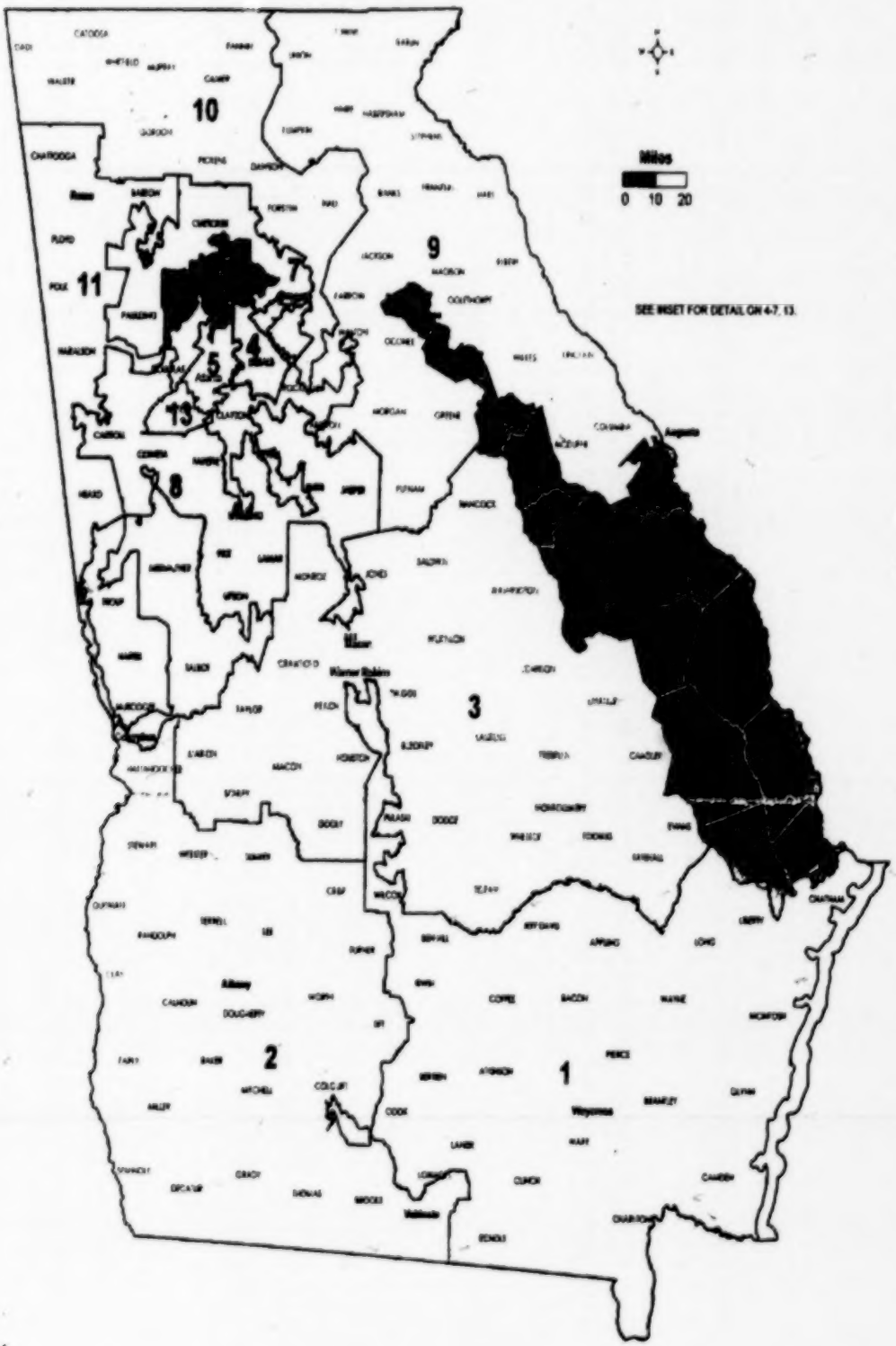
February 1, 2006

Georgia

Congressional Districts for 2002-2004 elections.

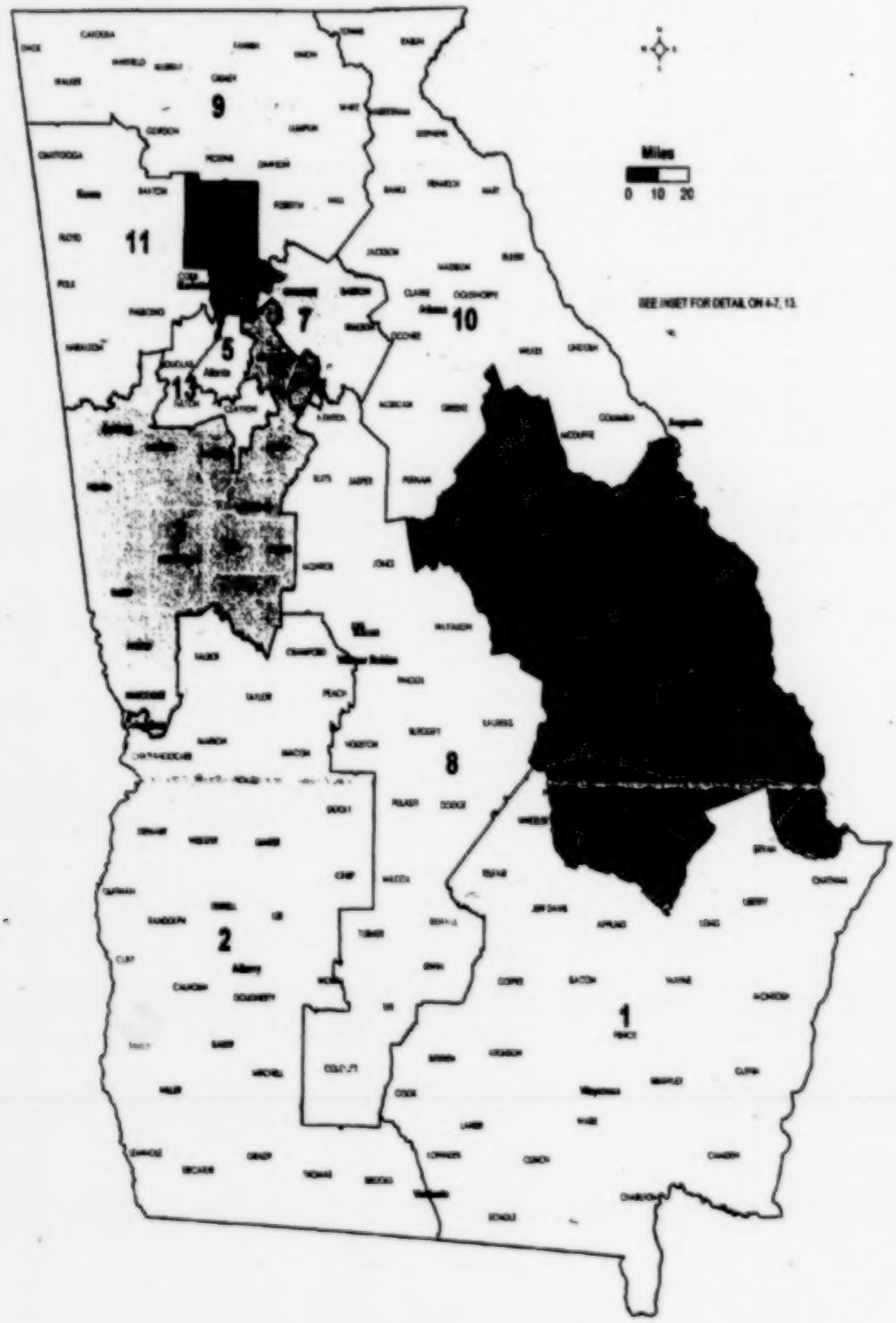


Congressional district boundaries first effective for the 2002 elections.

App. 1

Georgia

Congressional Districts for 2006-2010 elections.

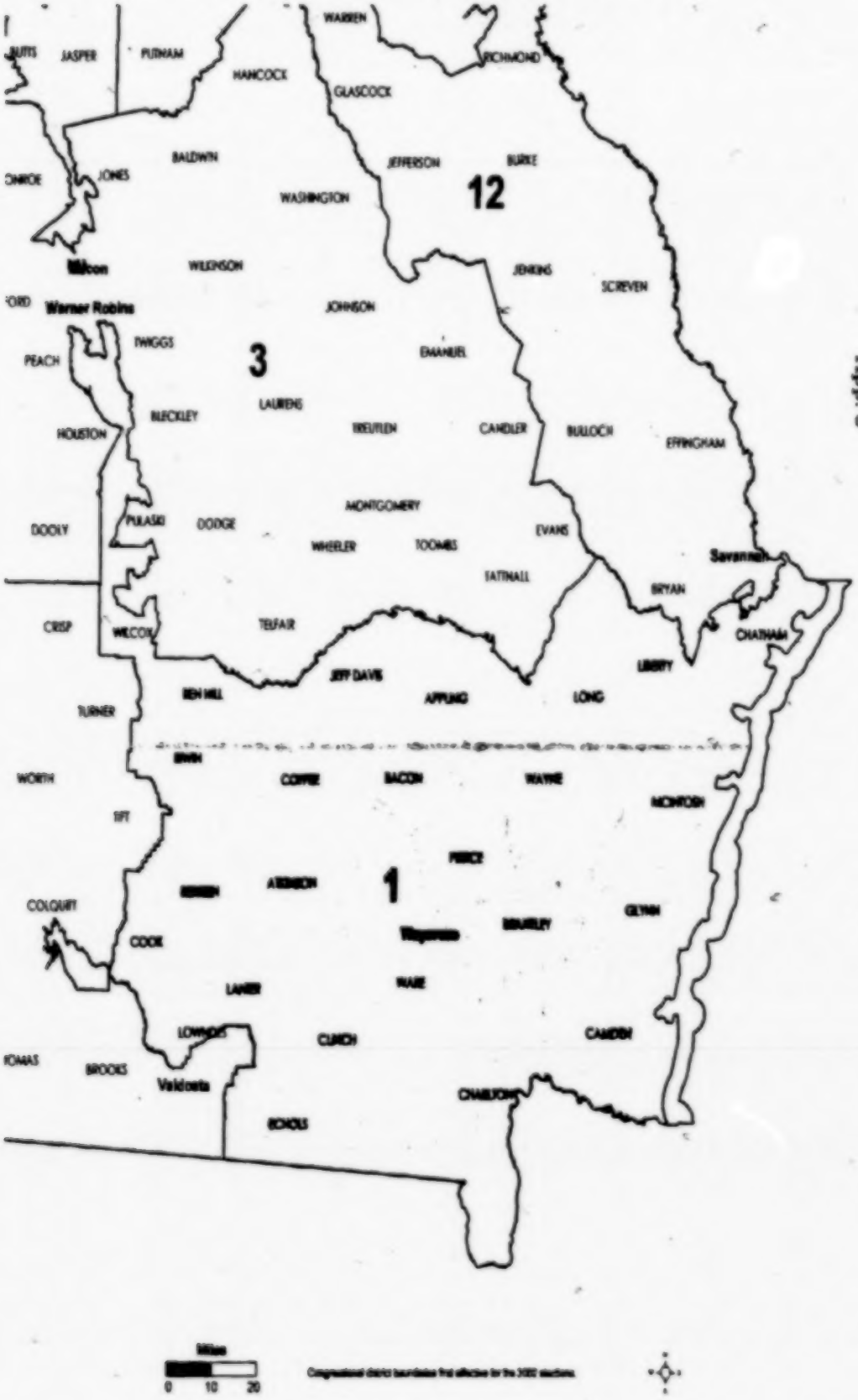


Congressional district boundaries first effective for the 2006 elections

App. 2

Georgia

Congressional Districts for 2002-2004 elections.

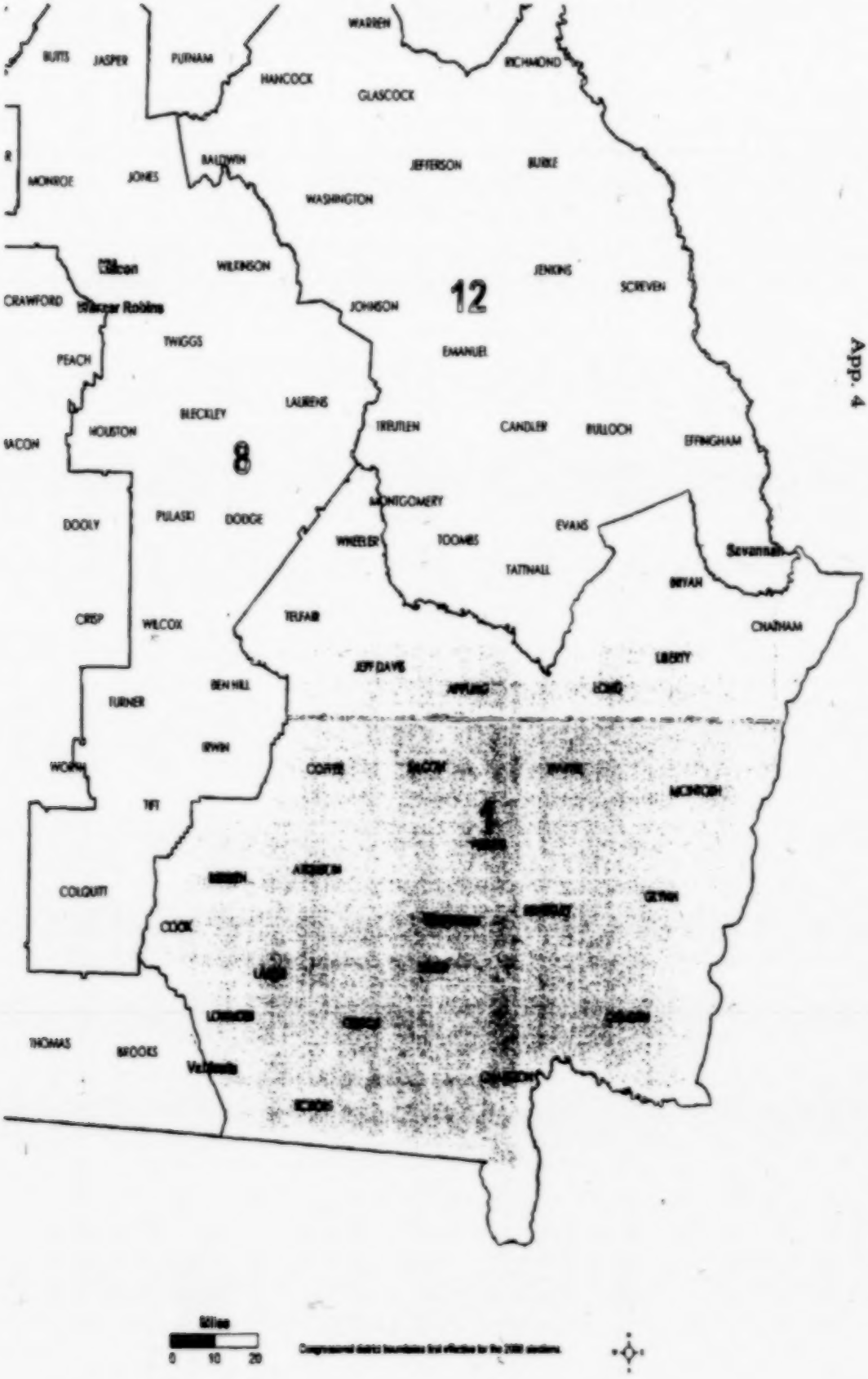


Congressional district boundaries first effective for the 2002 elections.

App. 3

Georgia

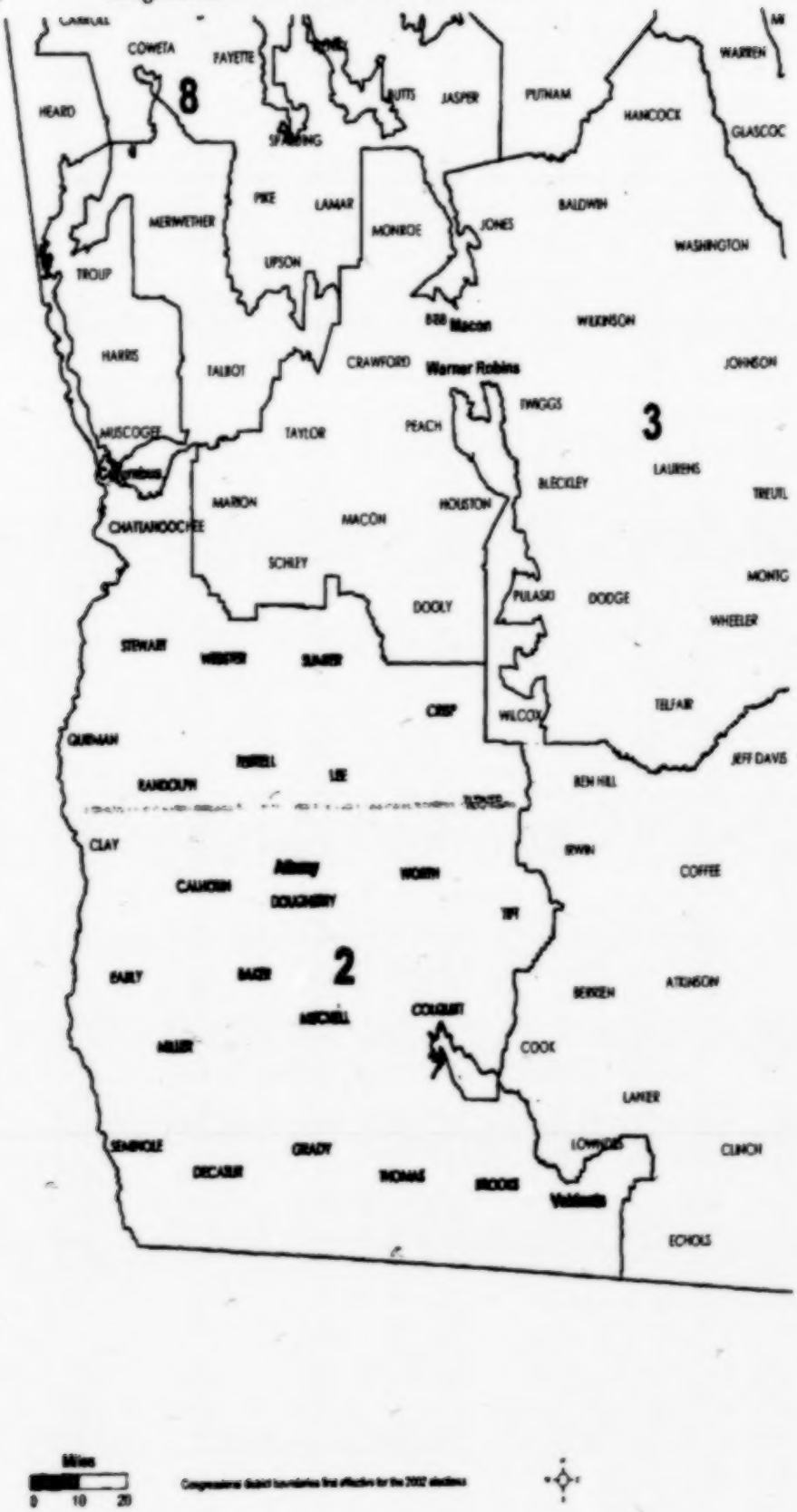
Congressional Districts for 2006-2010 elections.



App. 4

Georgia

Congressional Districts for 2002-2004 elections.



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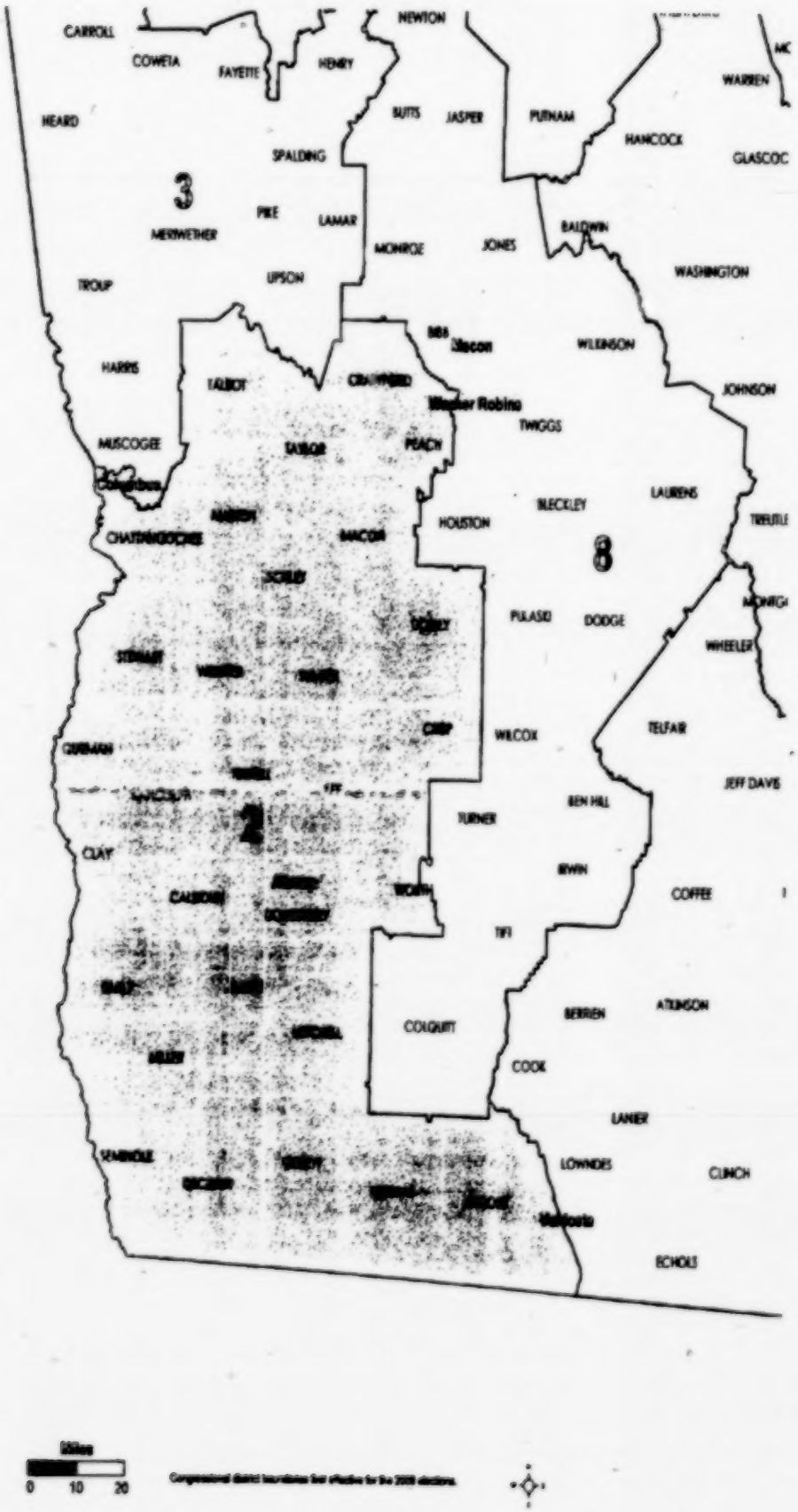
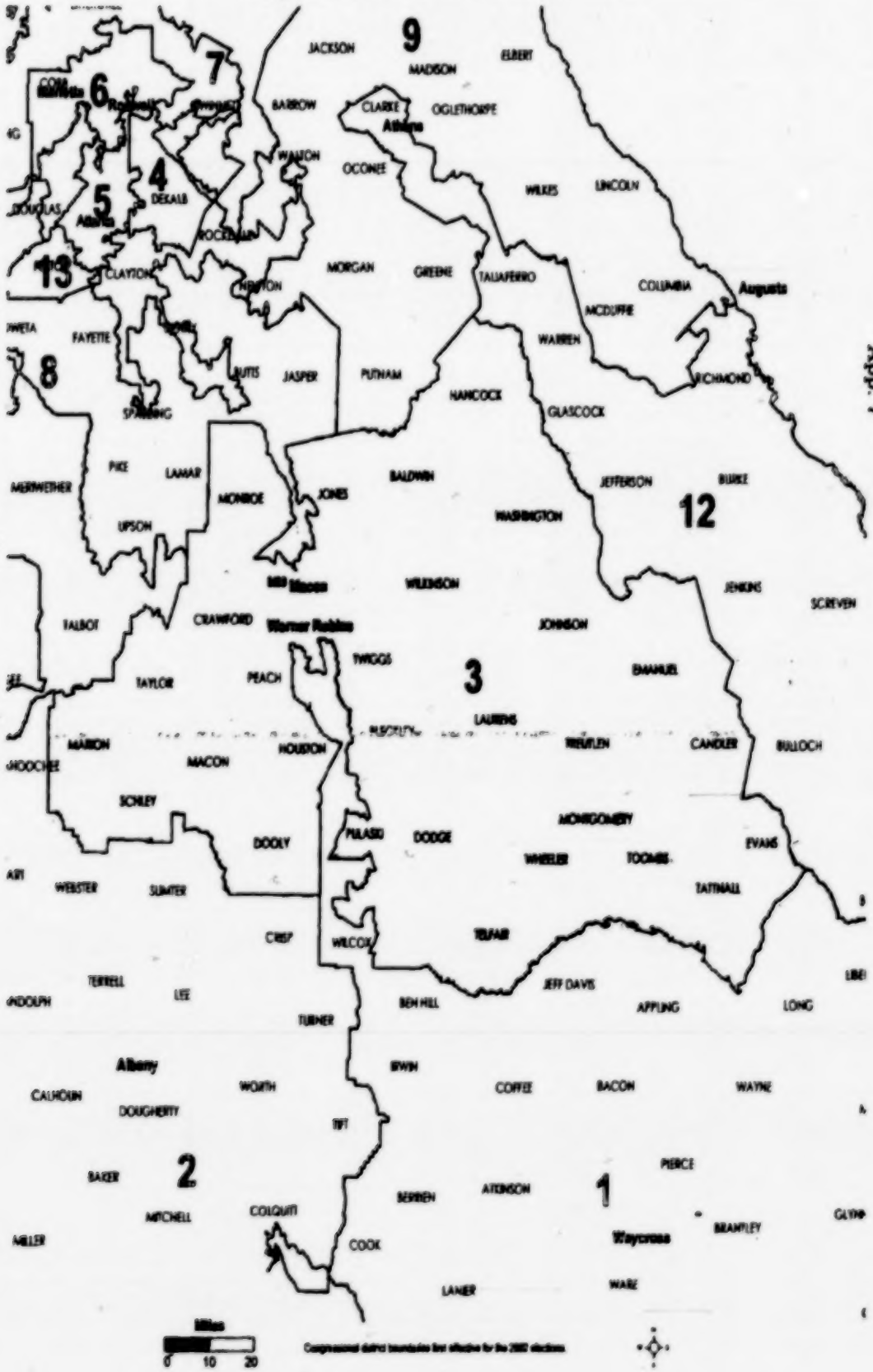
Congressional Districts for 2006-2010 elections.



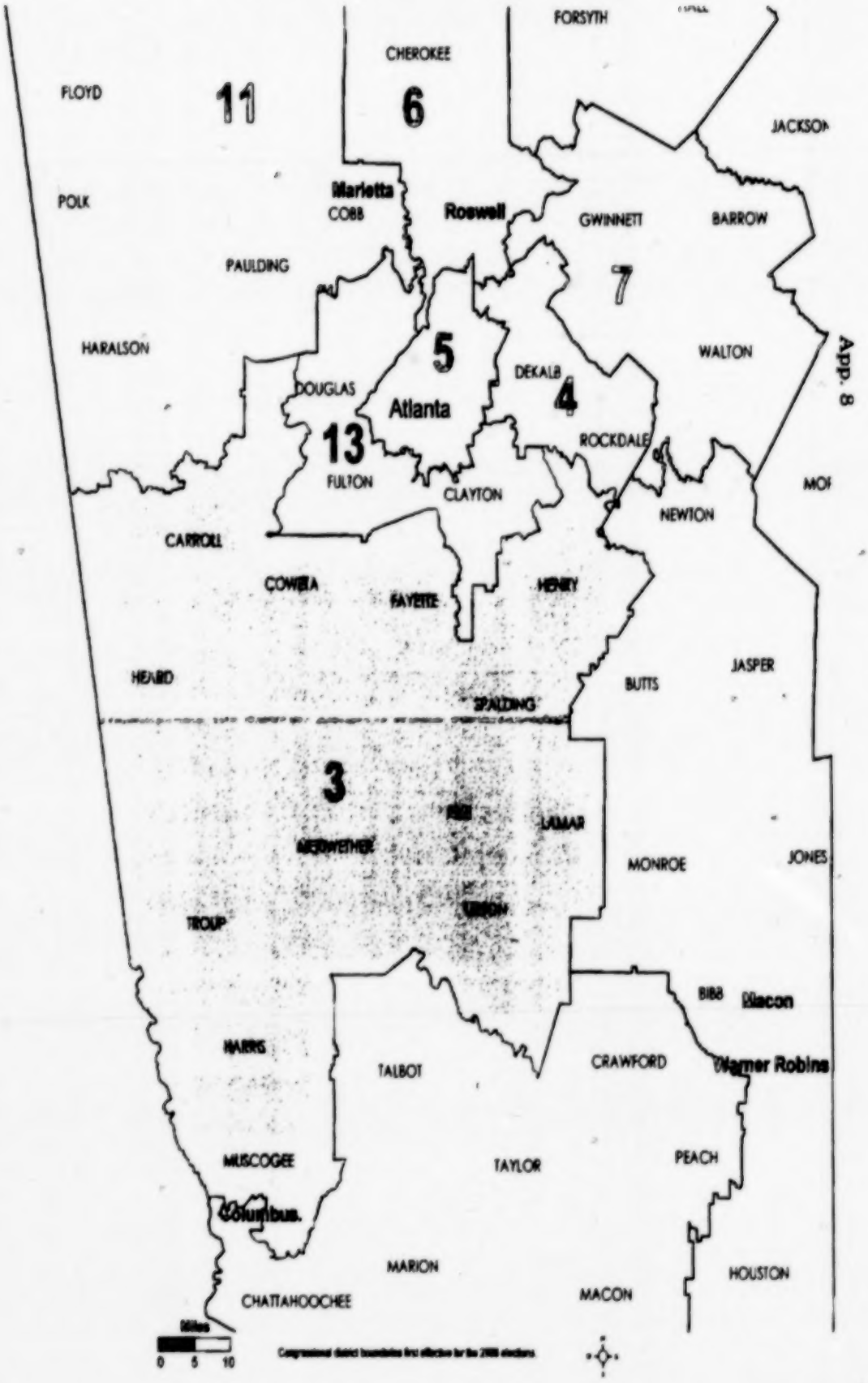
Georgia

Congressional Districts for 2002-2004 elections.



Georgia

Congressional Districts for 2006-2010 elections.



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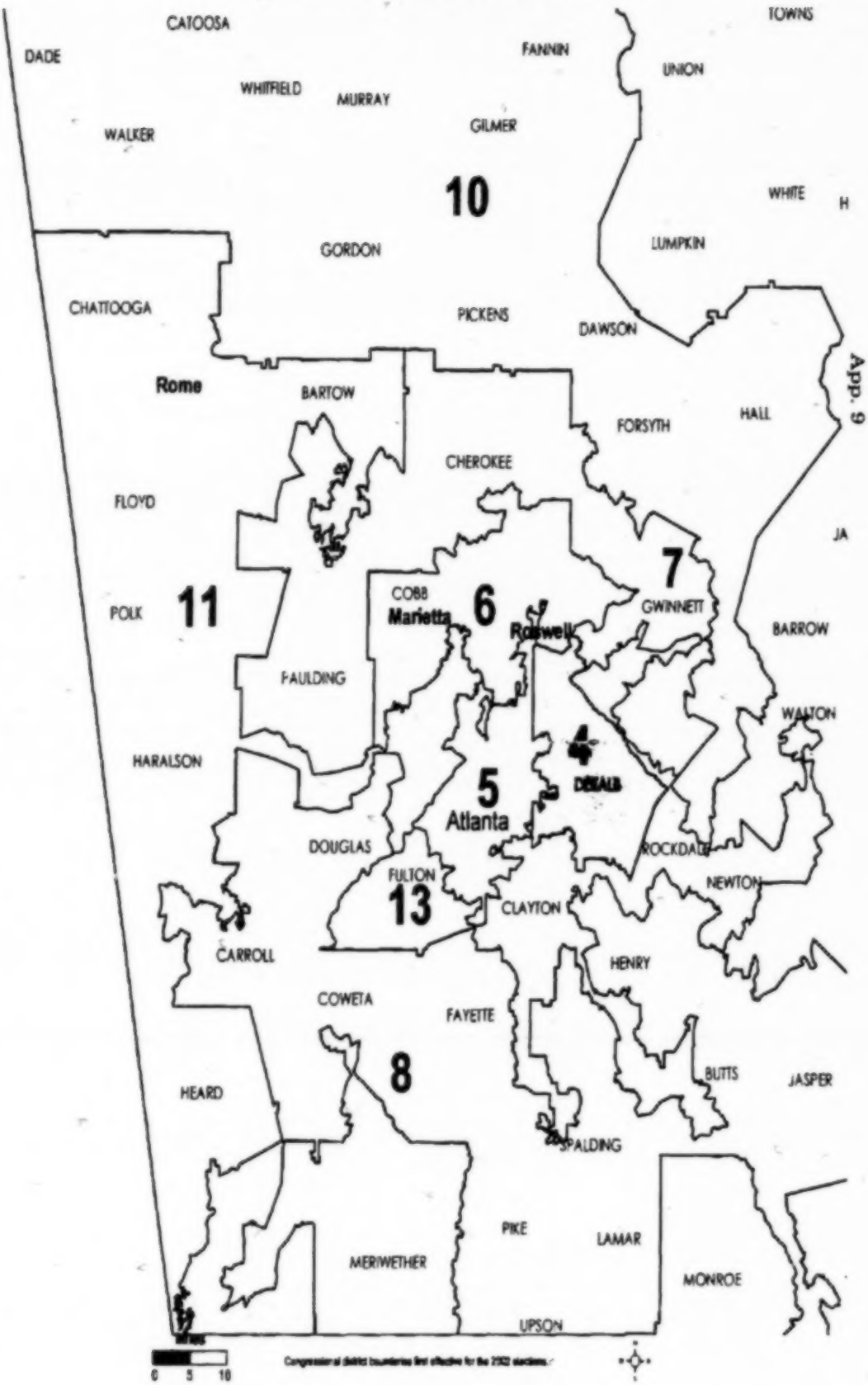
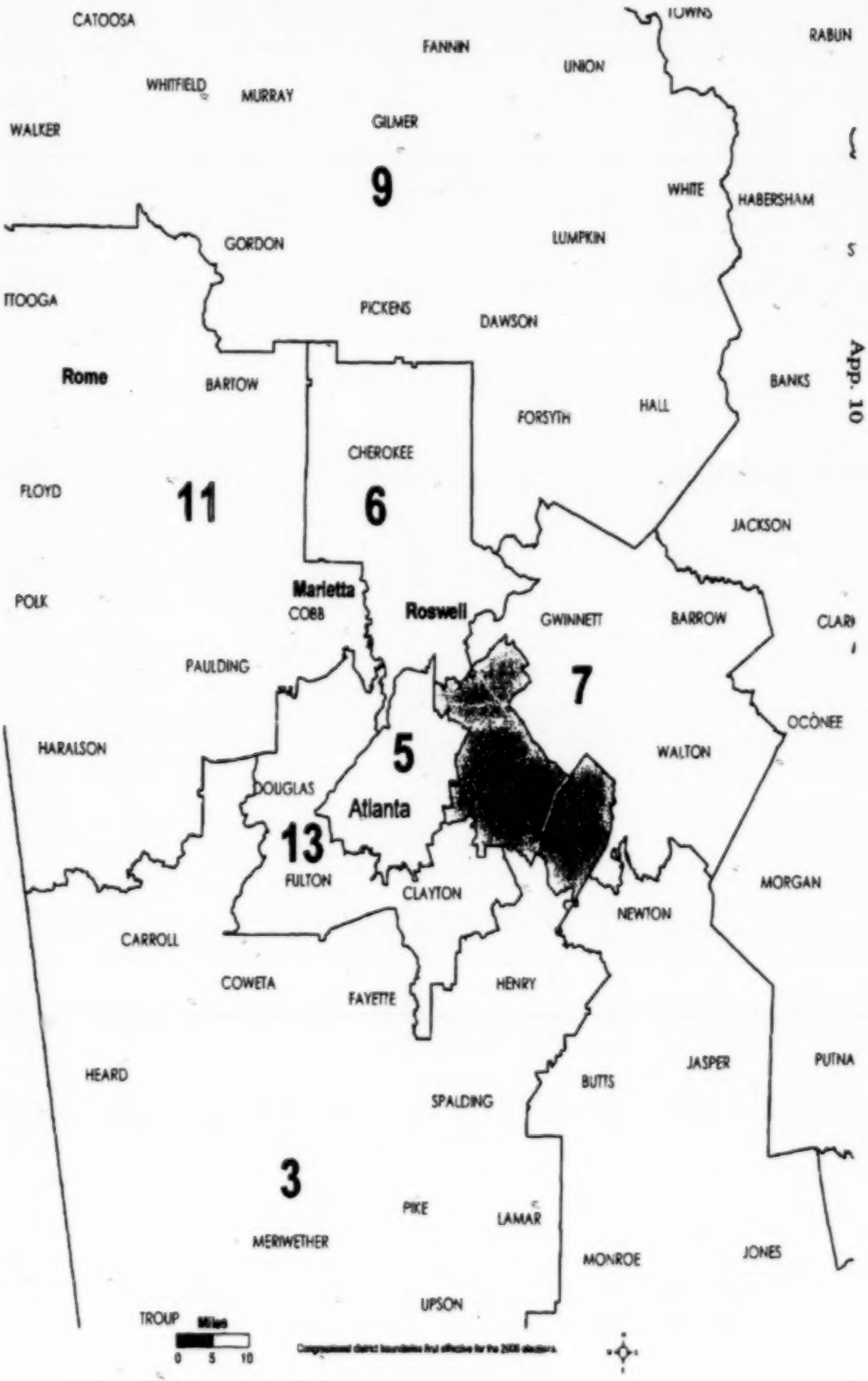


Georgia

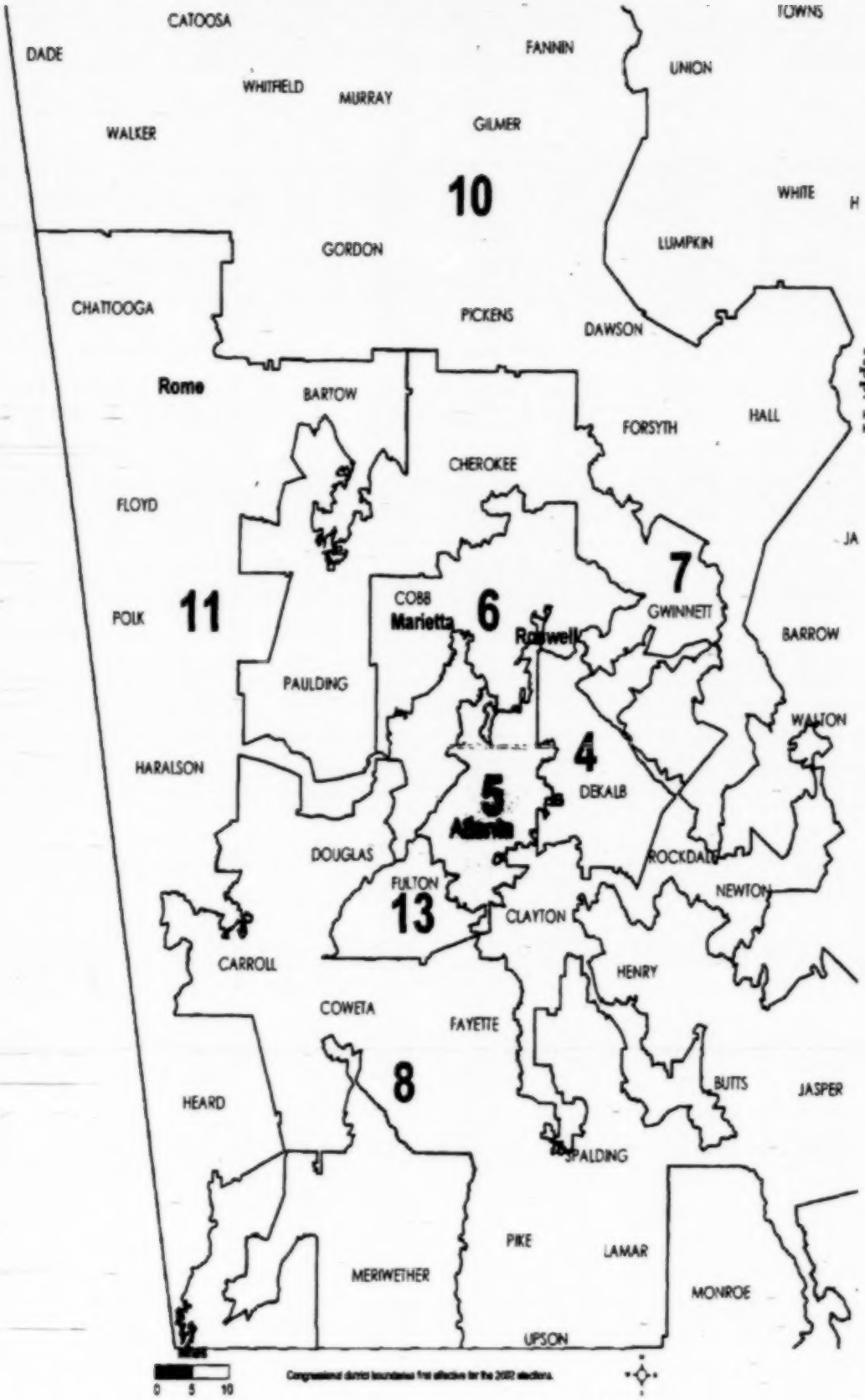
Congressional Districts for 2006-2010 elections.



App. 10

Georgia

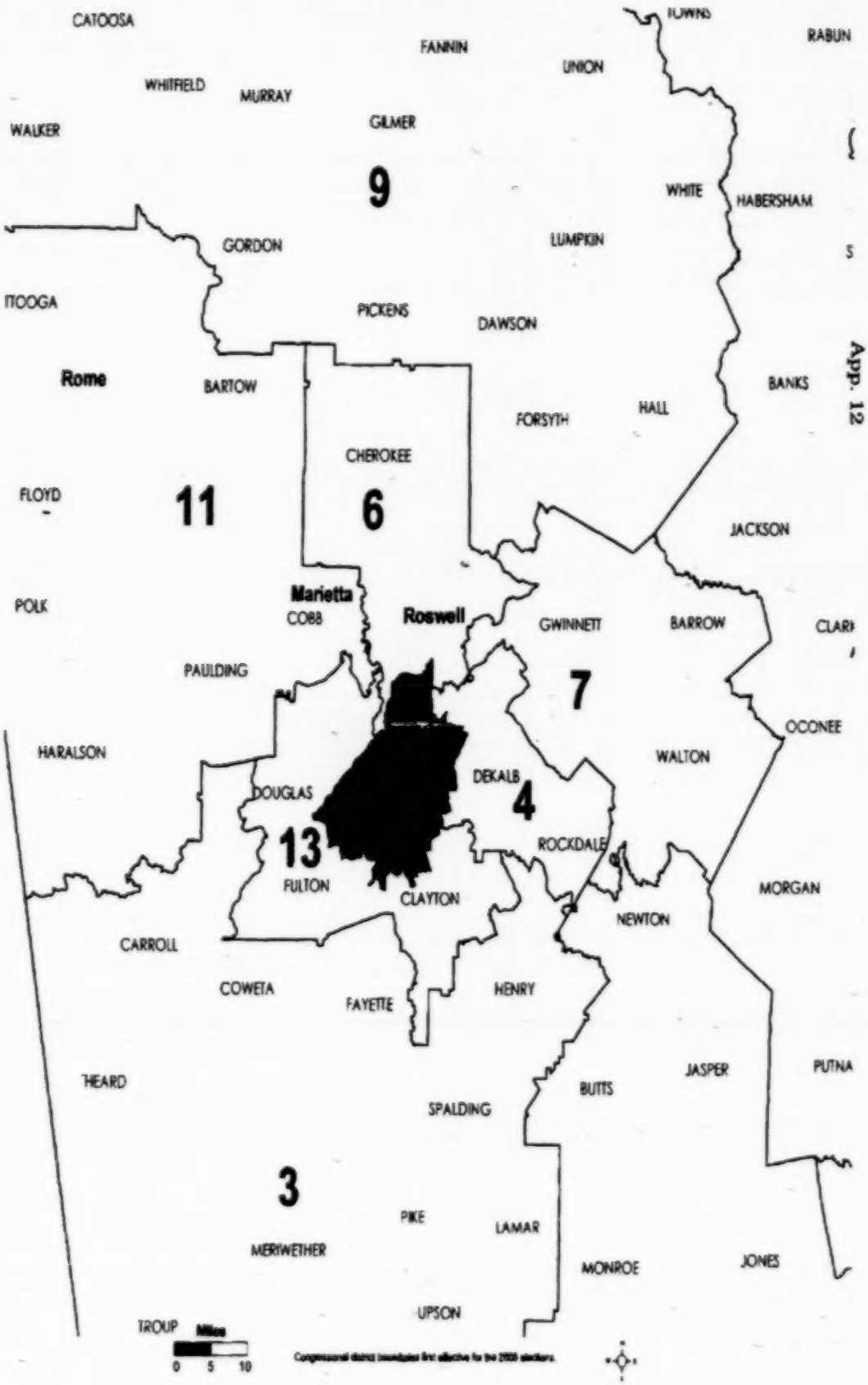
Congressional Districts for 2002-2004 elections.



App. 11

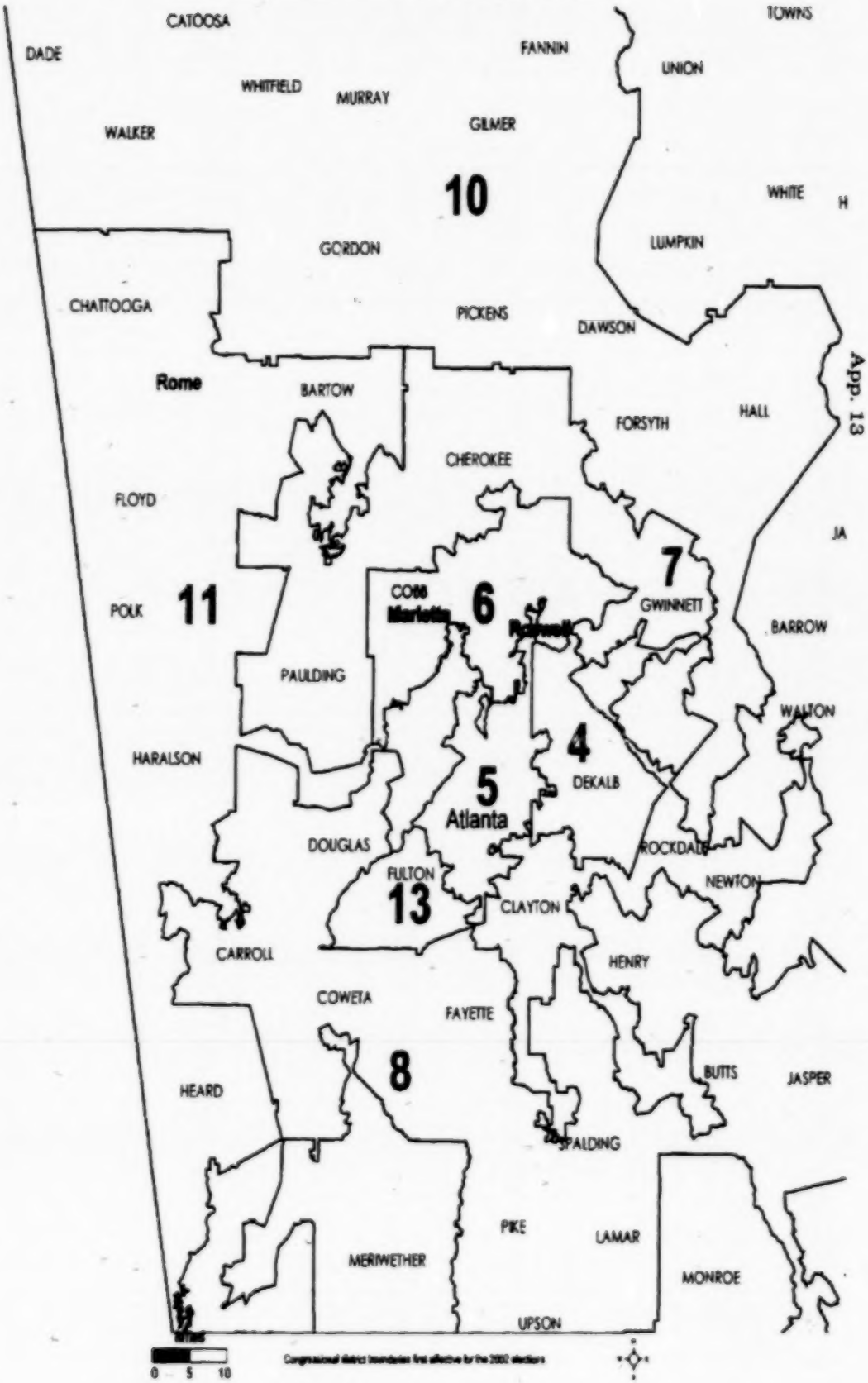
Georgia

Congressional Districts for 2006-2010 elections.



Georgia

Congressional Districts for 2002-2004 elections.



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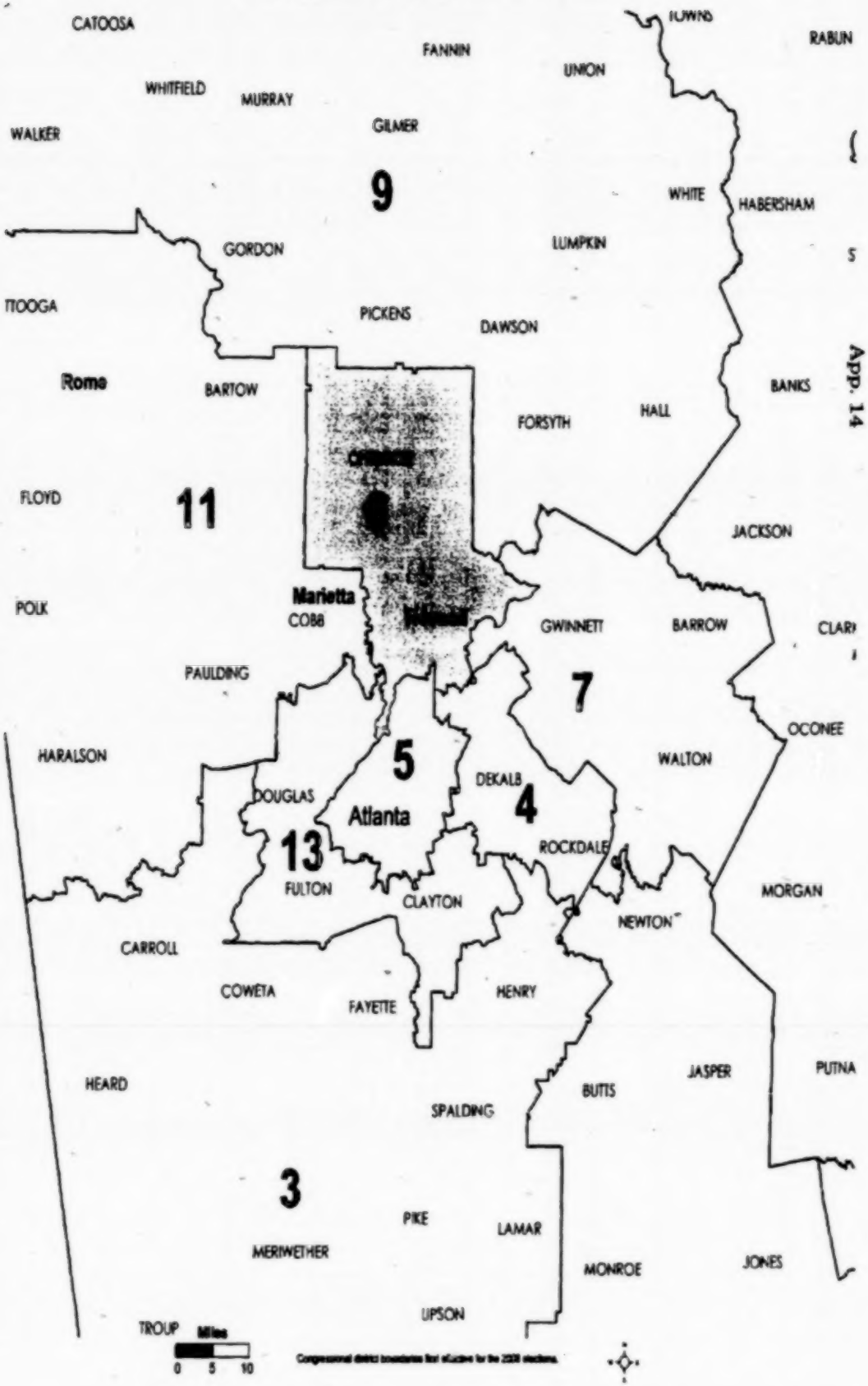
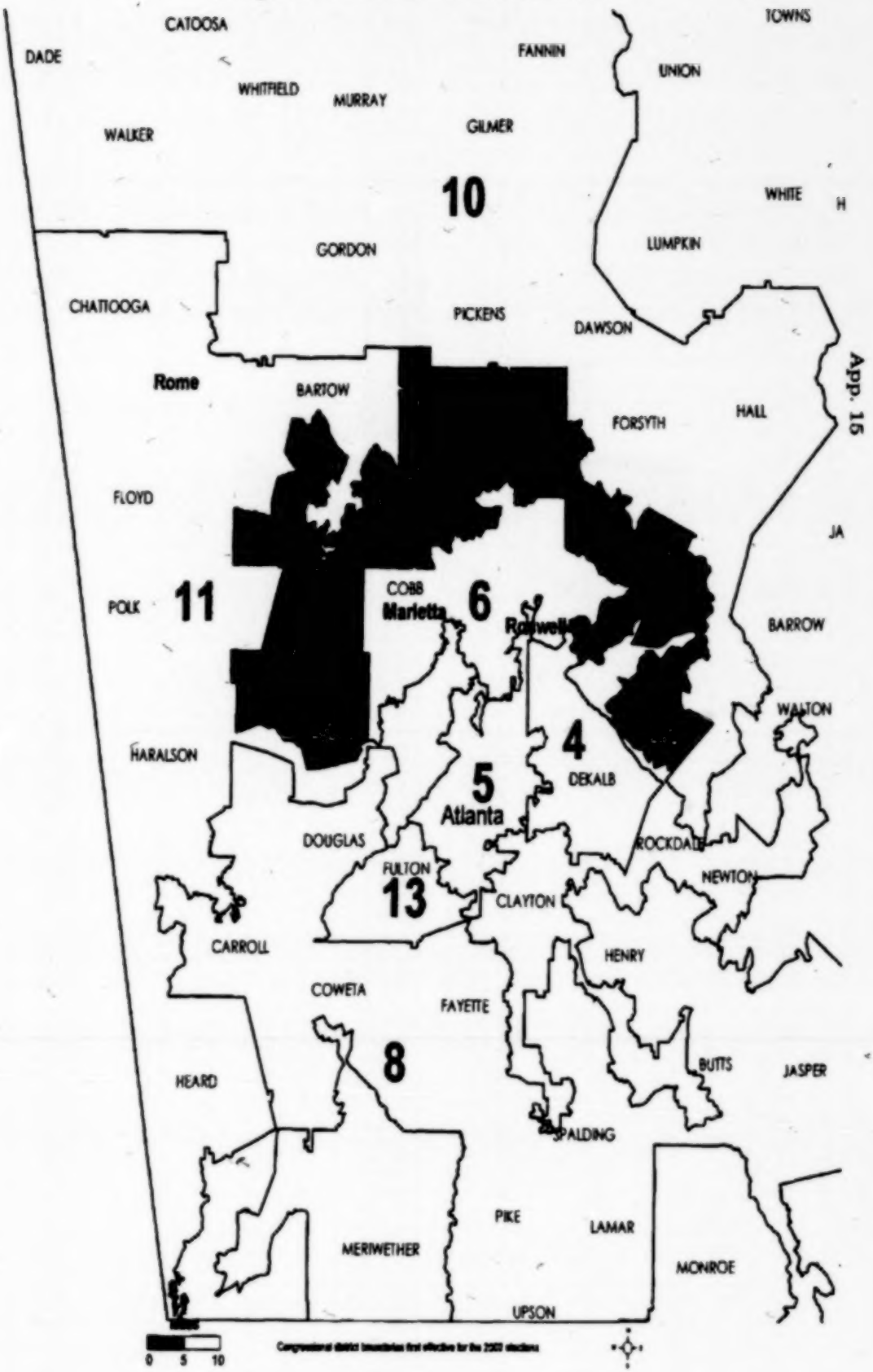


App. 14

Georgia

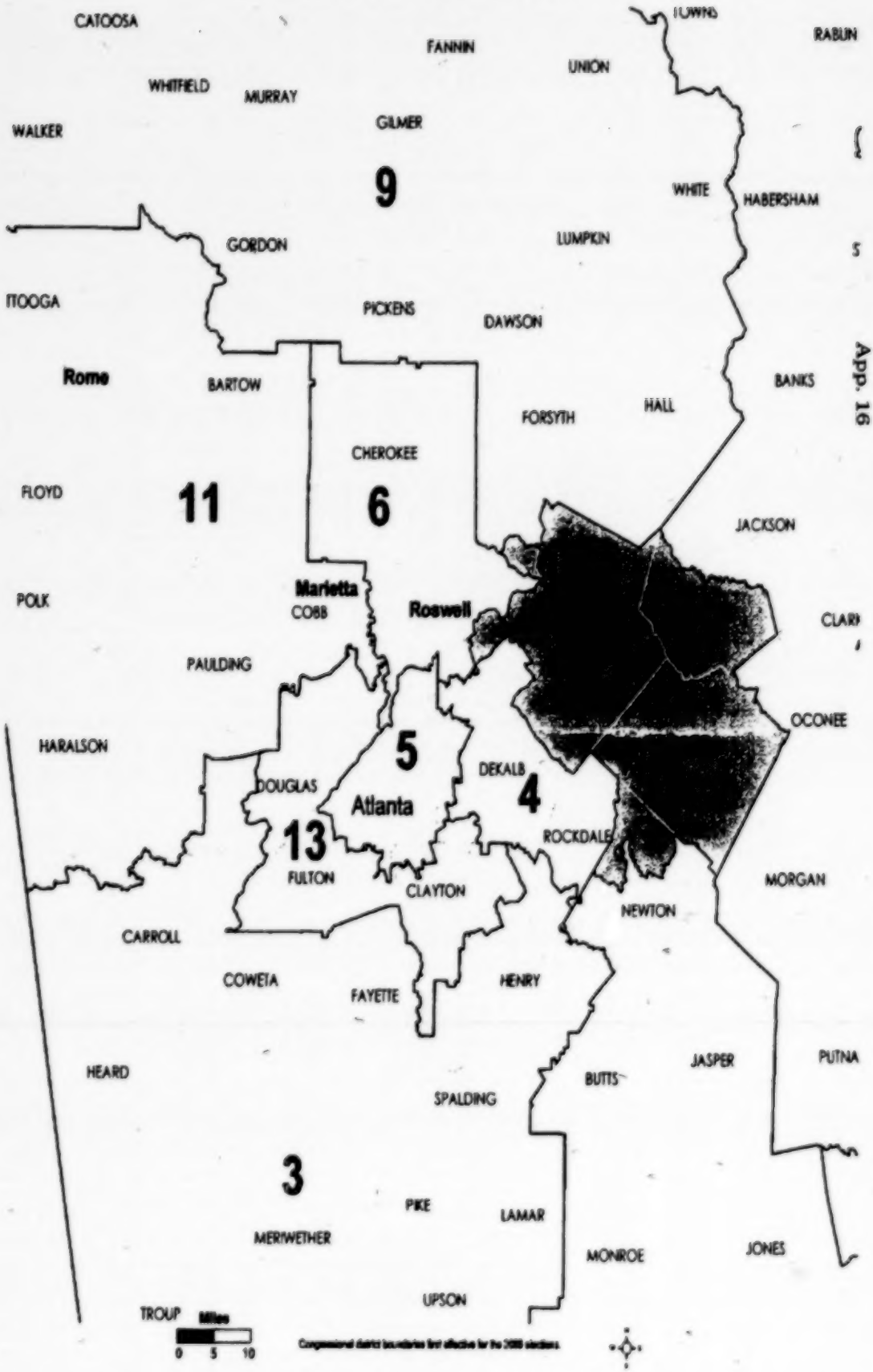
Congressional Districts for 2002-2004 elections.



App. 15

Georgia

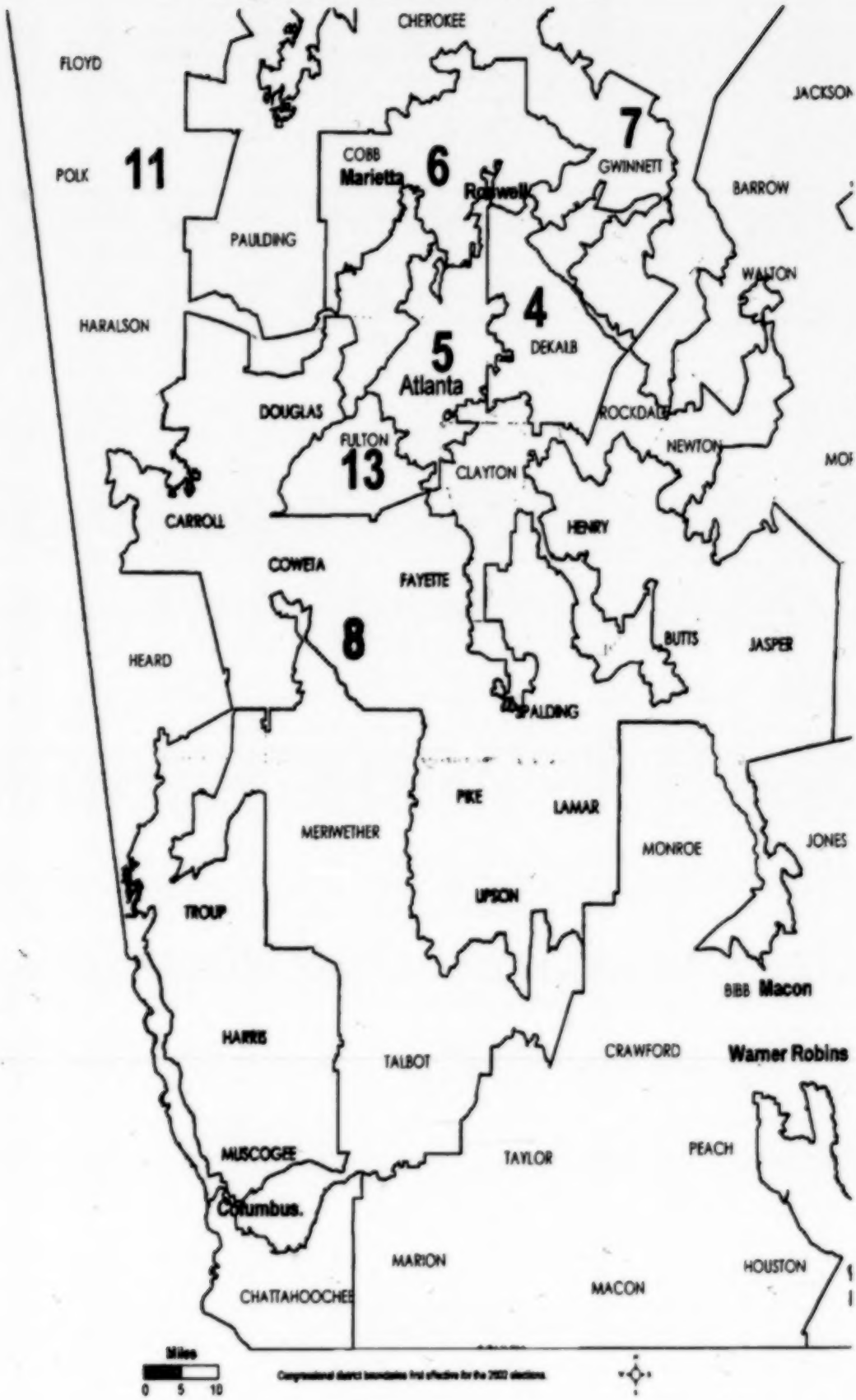
Congressional Districts for 2006-2010 elections.



App. 16

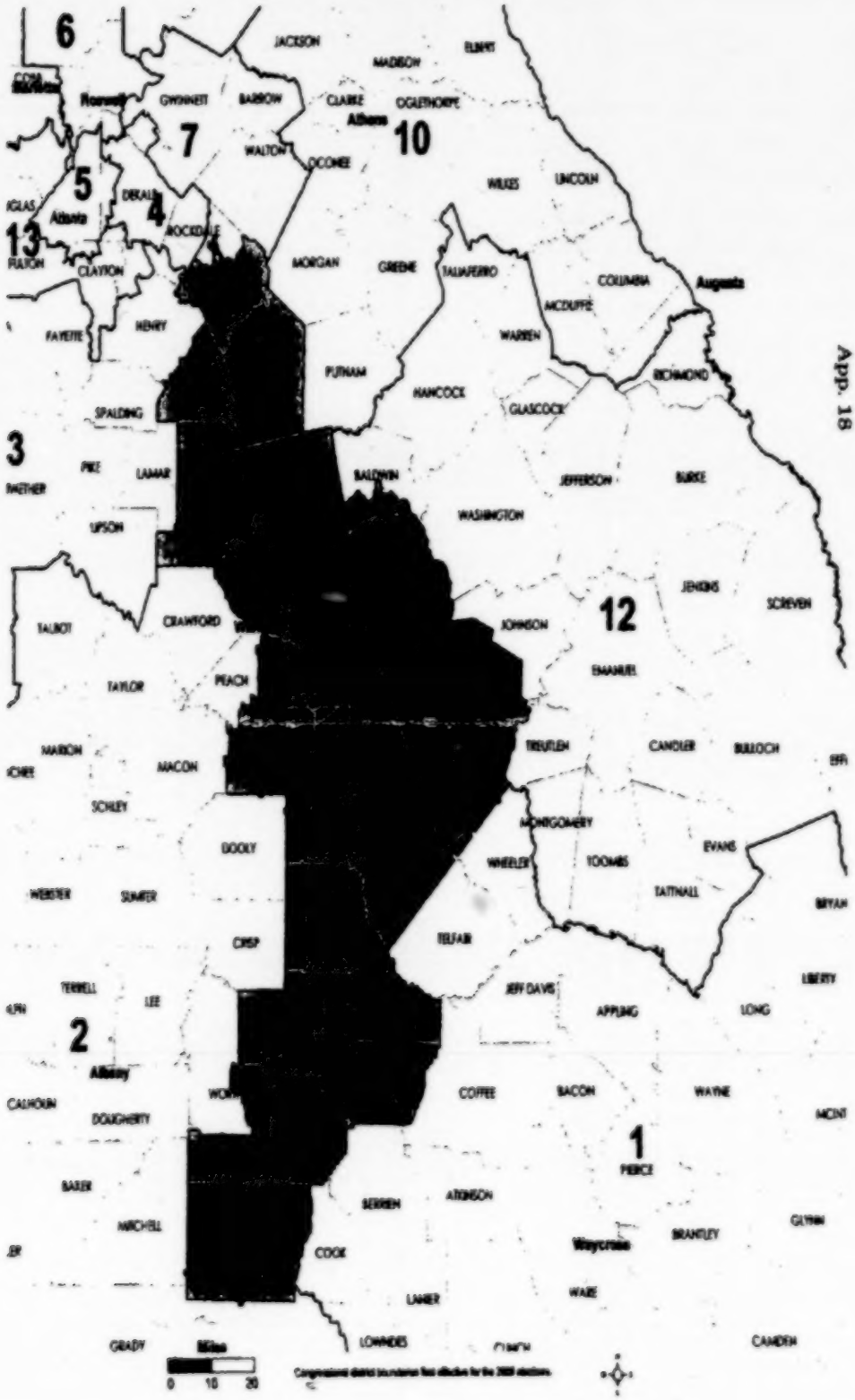
Georgia

Congressional Districts for 2002-2004 elections.



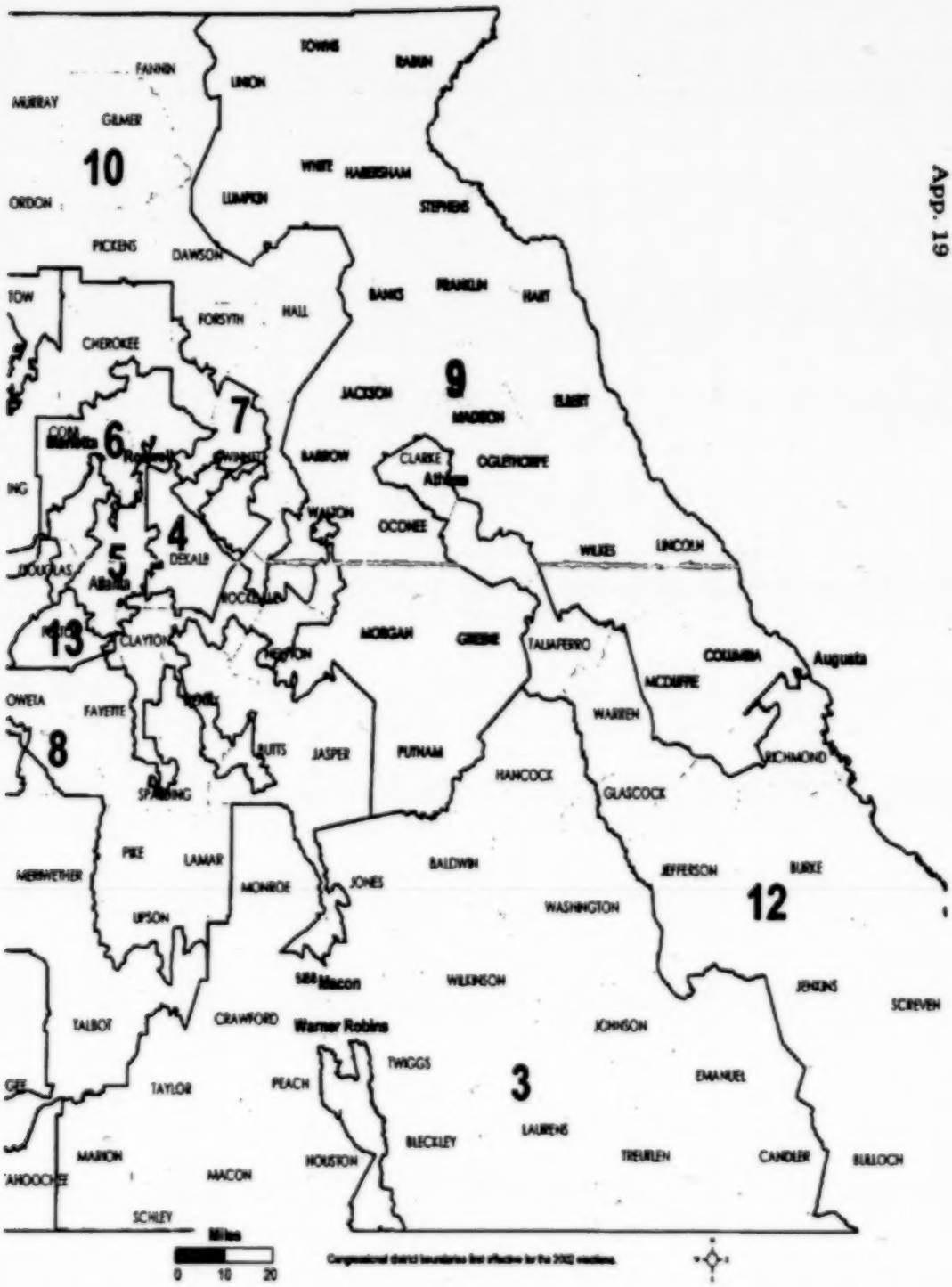
Georgia

Congressional Districts for 2006-2010 elections.



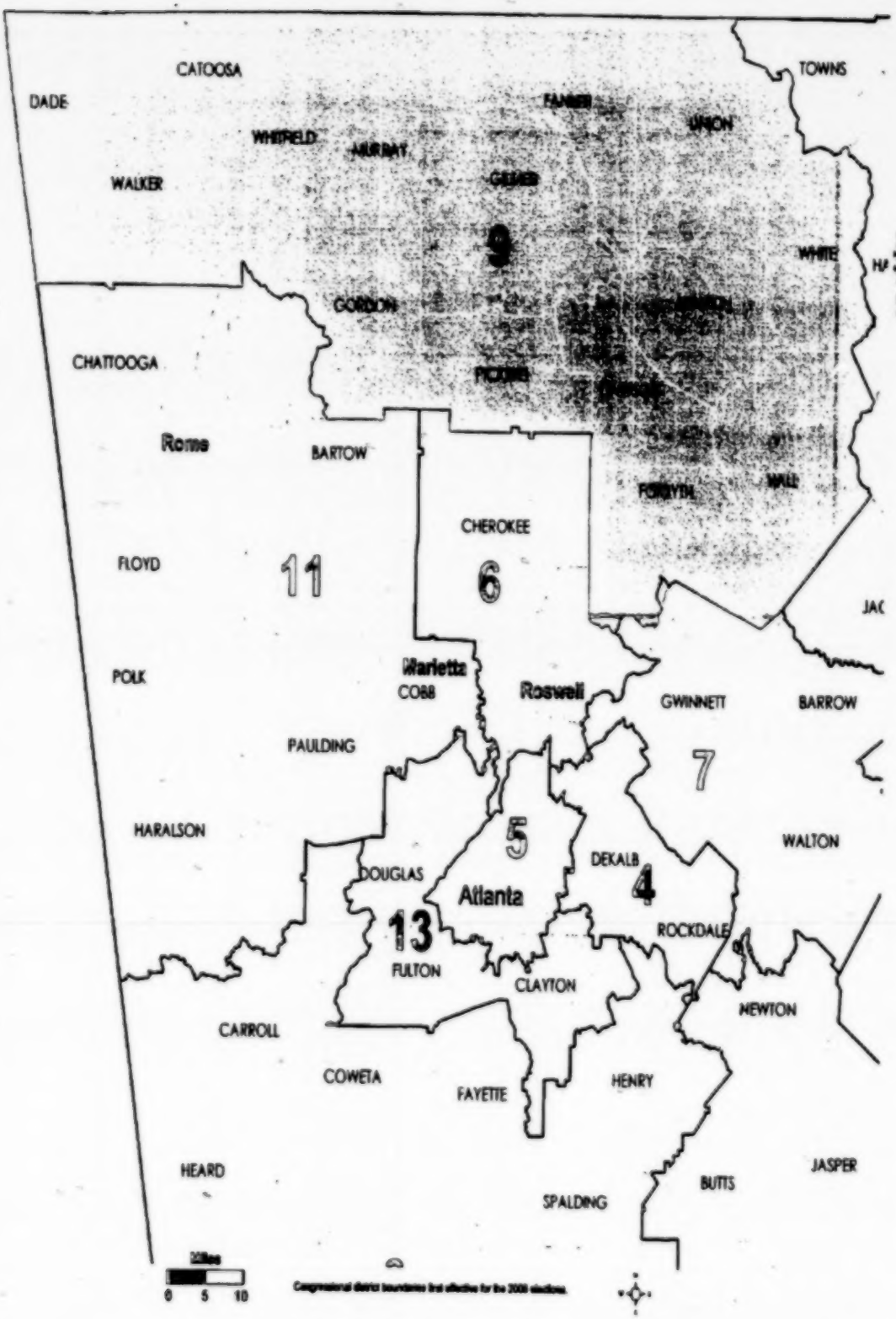
Georgia

Congressional Districts for 2002-2004 elections.



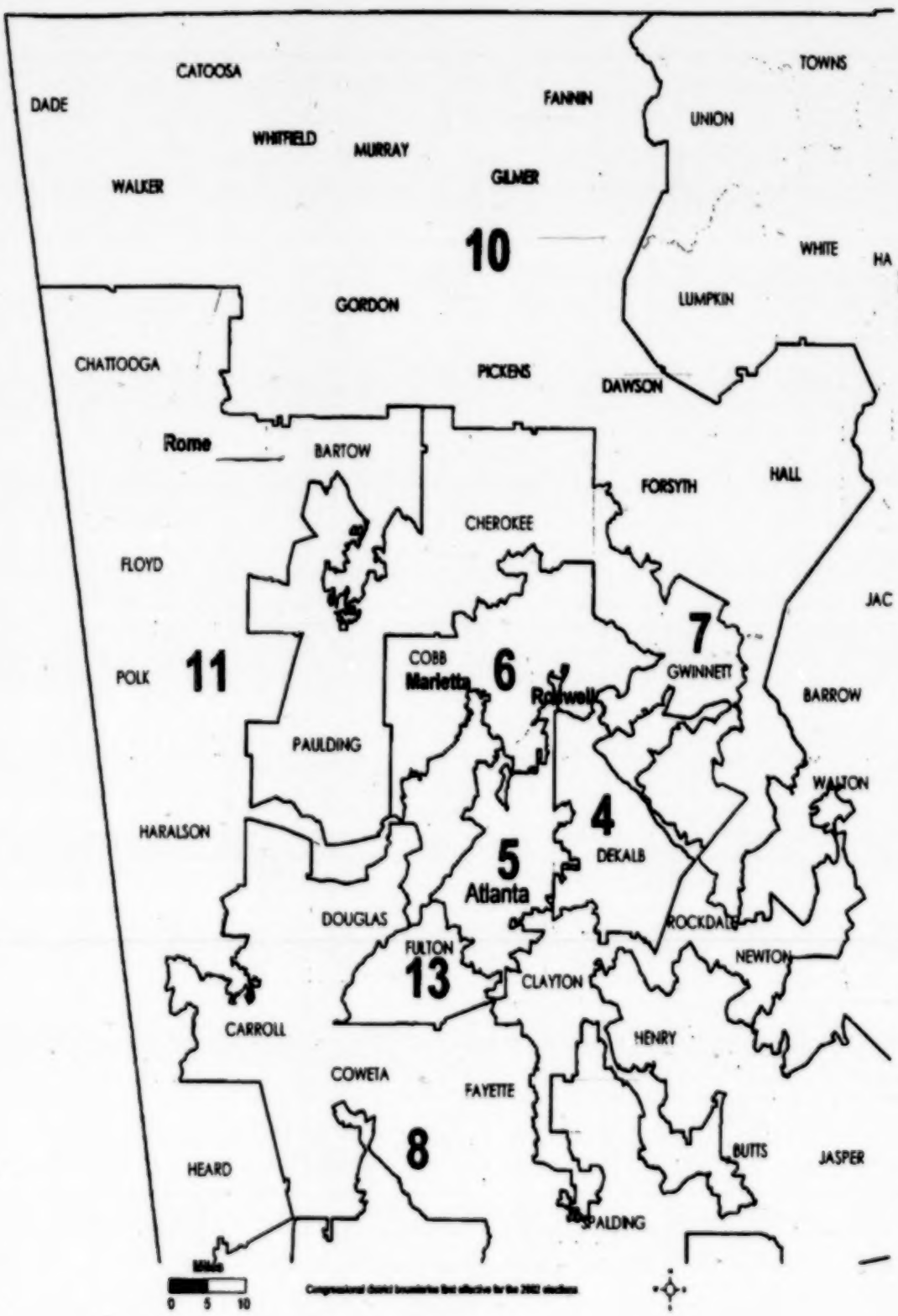
Georgia

Congressional Districts for 2006-2010 elections.



Georgia

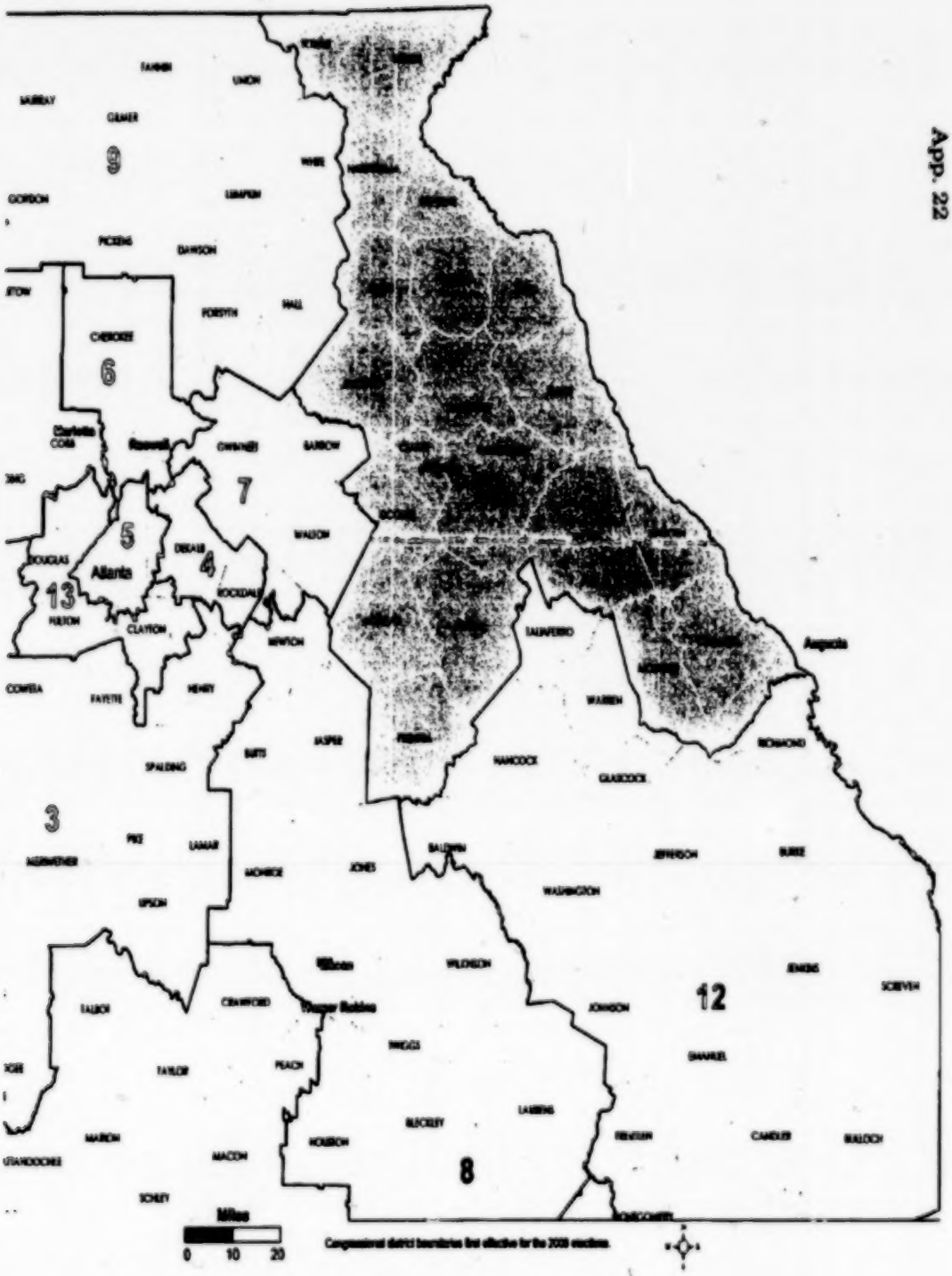
Congressional Districts for 2002-2004 elections.



App. 21

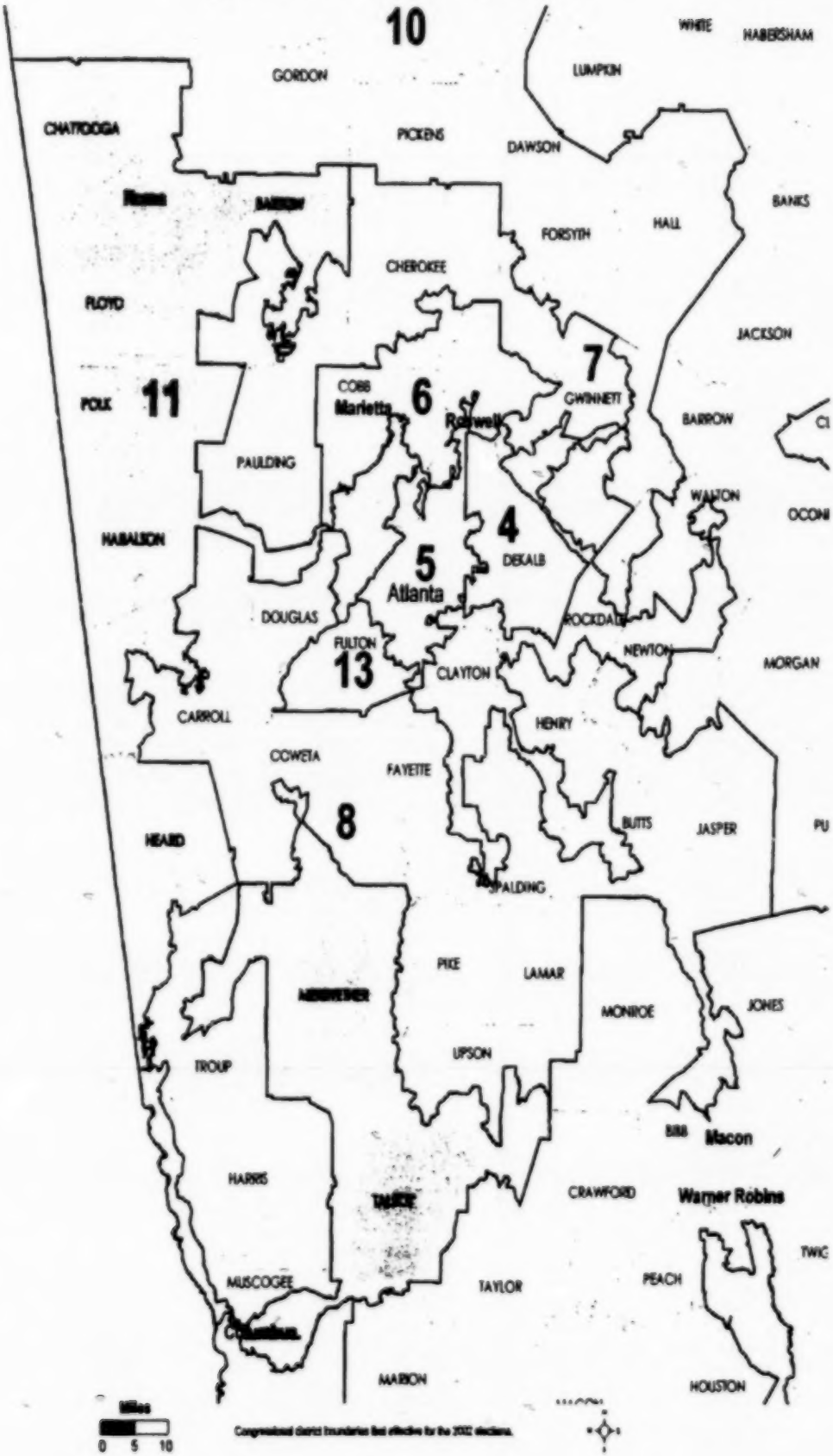
Georgia

Congressional Districts for 2006-2010 elections.



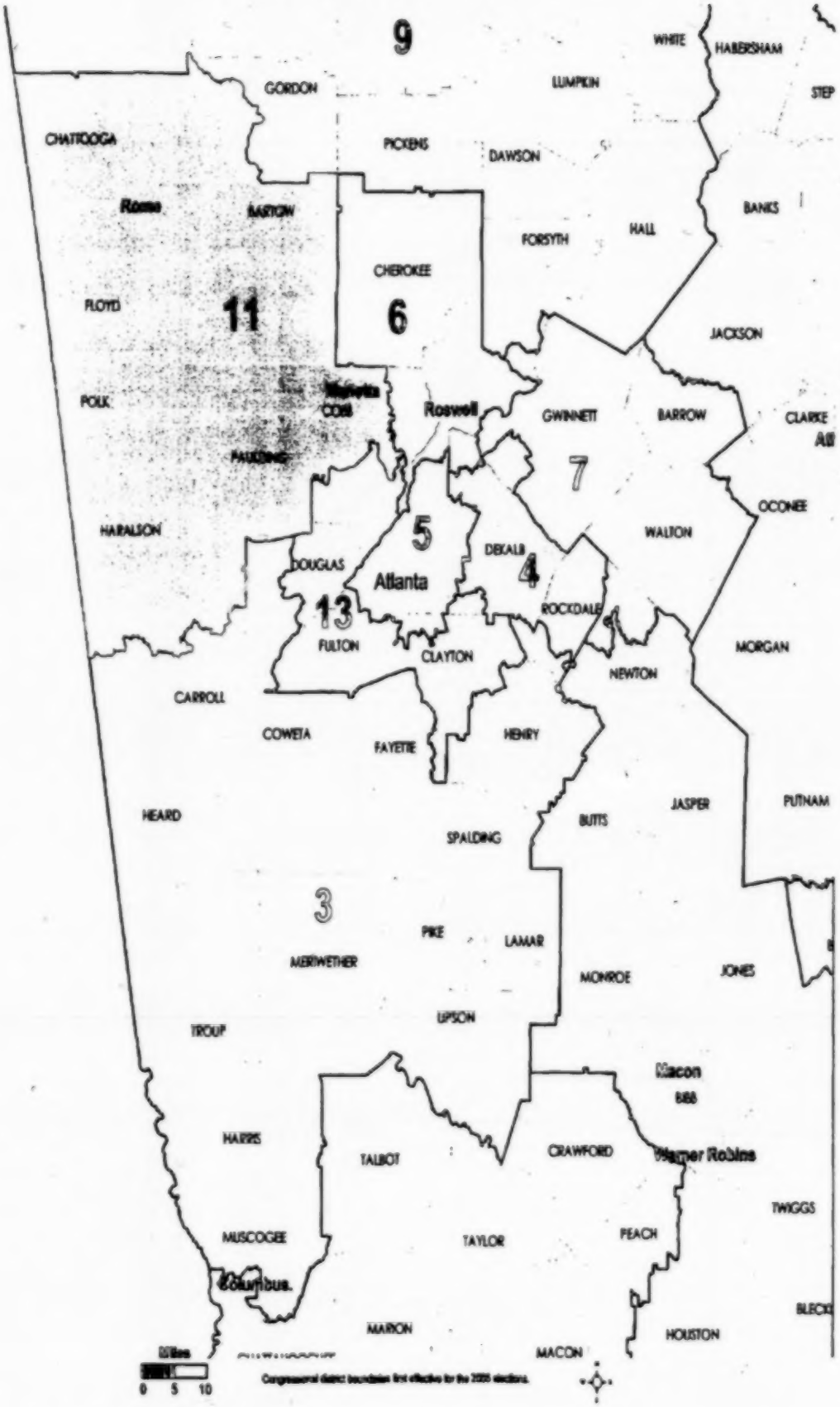
Georgia

Congressional Districts for 2002-2004 elections.



Georgia

Congressional Districts for 2006-2010 elections.

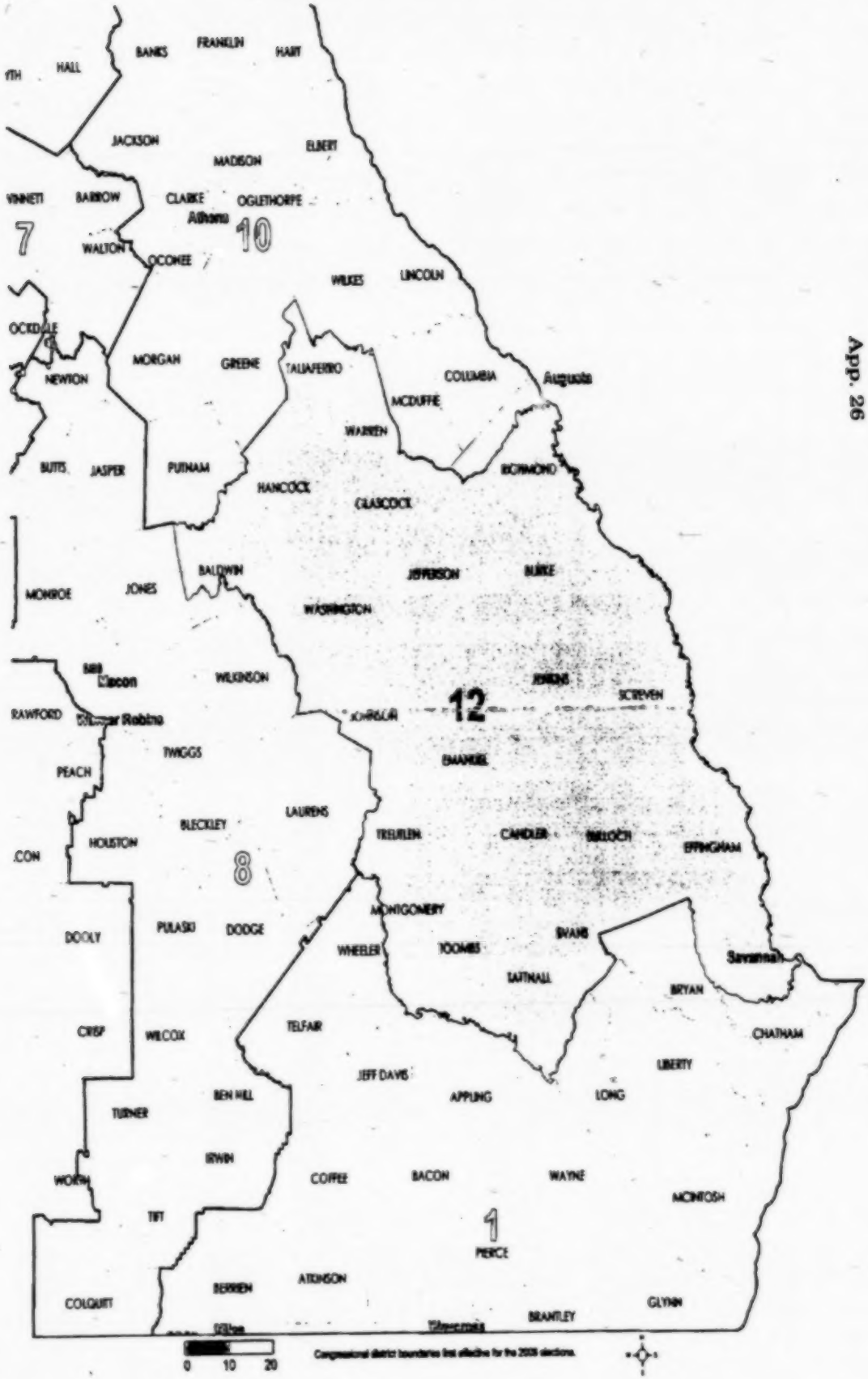


Georgia

Congressional Districts for 2002-2004 elections.

Georgia

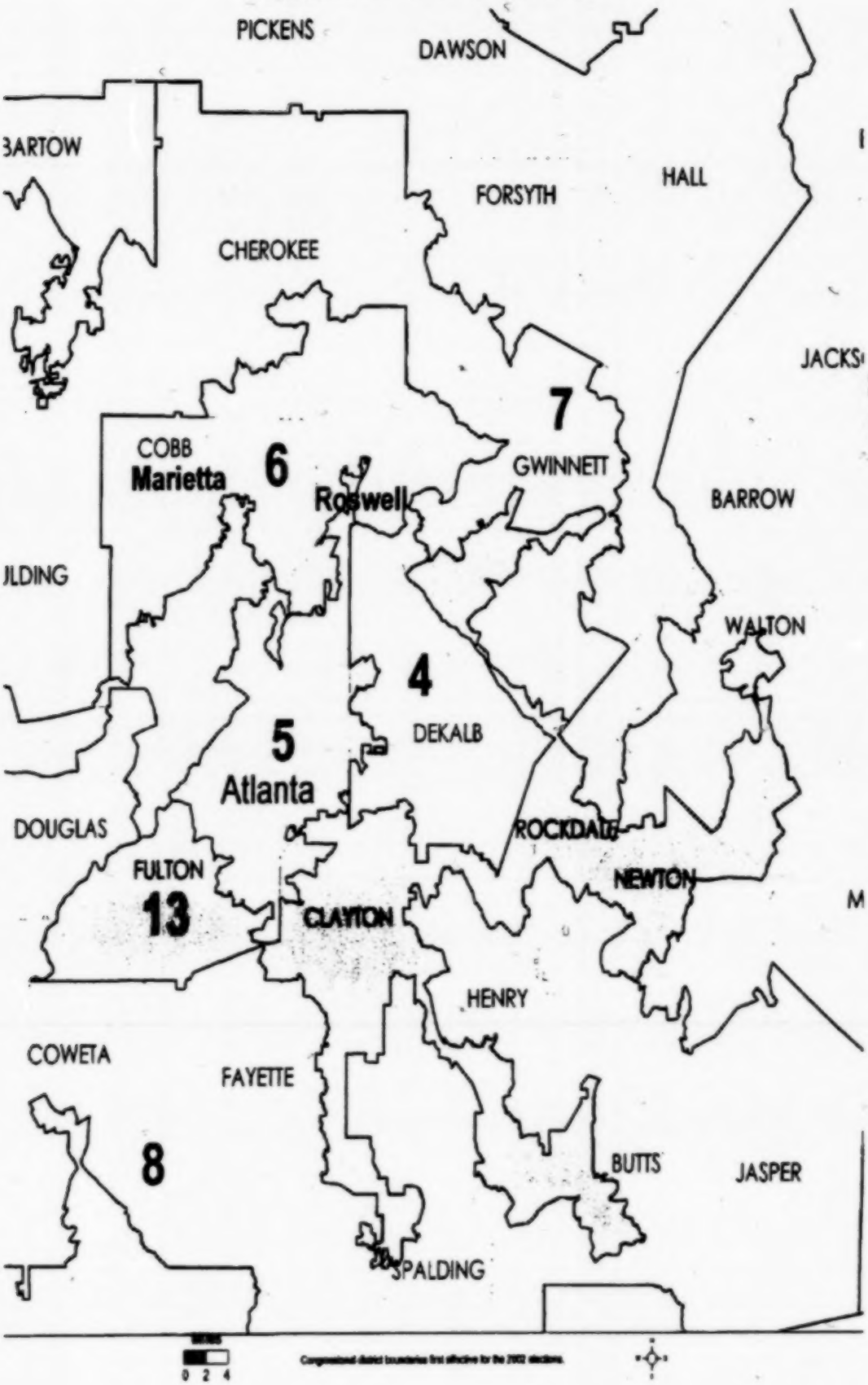
Congressional Districts for 2006-2010 elections.

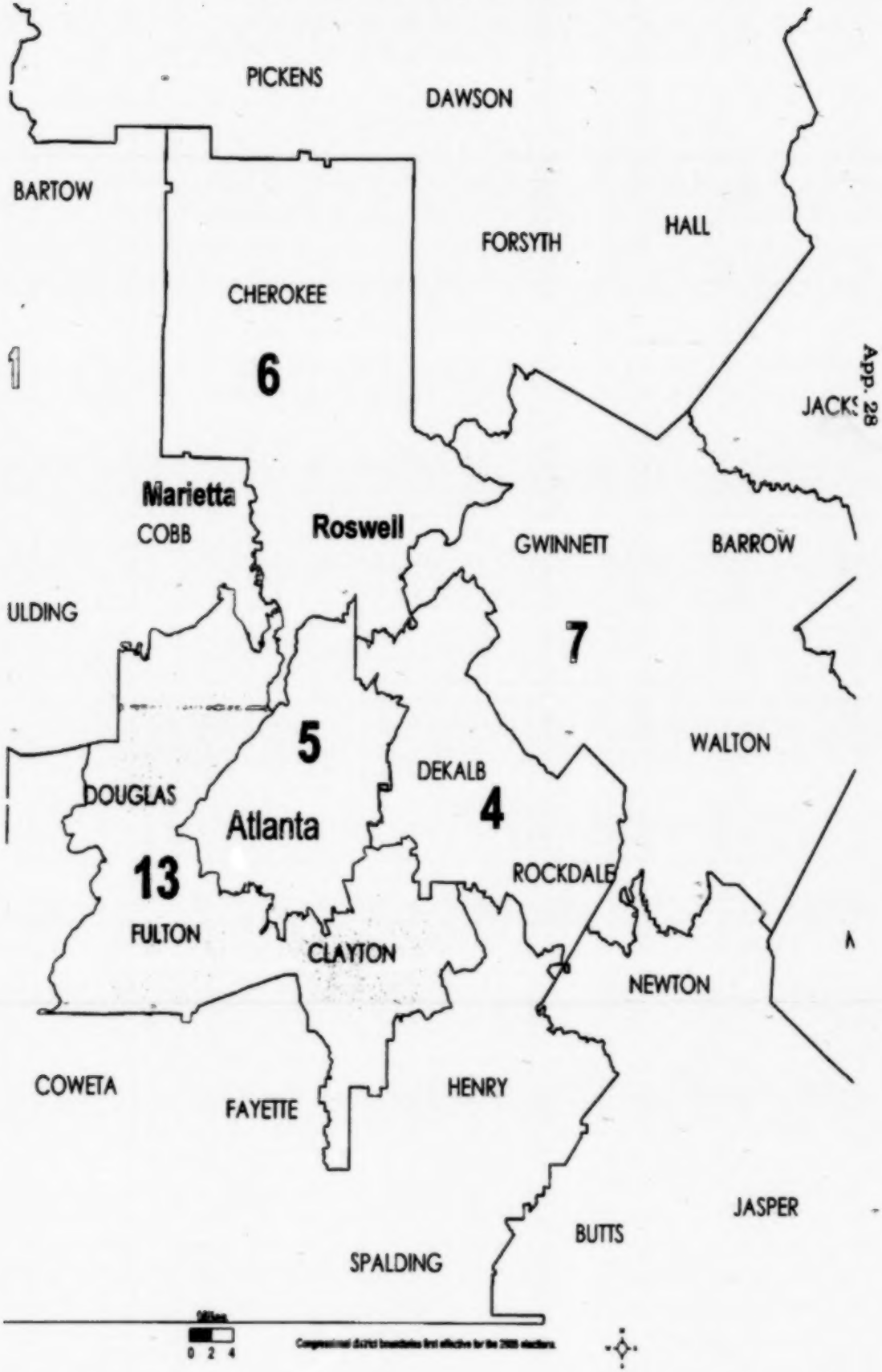


App. 26

Georgia

Congressional Districts for 2002-2004 elections.



Georgia

Congressional Districts for 2006-2010 elections.